86-1574

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE CHEMEHUEVI INDIAN TRIBE,

Petitioner,

vs.

CALIFORNIA STATE BOARD OF EQUALIZATION, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a State and an Indian Tribe impose an identical tax, in the exact amount on the same on-reservation sales transaction to non-tribal members, does Article I, Section 8, Clause 3 of the United States Constitution (Commerce Clause) require the State to credit against its own tax the amount of the Tribe's tax?

2. Does imposition of the State of California's ("State") use tax on reservation sales made by the Chemehuevi Indian Tribe ("Tribe"), the full measure of which has already been taxed by the Tribe, constitute an impermissible multiple tax burden which discriminates against Indian commerce by placing reservation retailers at a competitive disadvantage with off-reservation retailers?

3. Where the Tribe is not marketing an exemption from state taxation, does imposition of the State's use tax upon sales of cigarettes, the full value of which has already been taxed by the Tribe, constitute a prohibited interference with tribal self-government?

4. Is the State's Cigarette Tax Law, as applied to sales of cigarettes by the Tribe on its reservation to non-tribal members, preempted by the provisions of the Indian Financing Act, Indian Reorganization Act and the policies embodied in those Acts?

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are: (1) Chemehuevi Indian Tribe, petitioner and (2) California State Board of Equalization; George R. Reilly; Iris Stankey; William M. Bennett; Richard Nevin and Kenneth Cory.

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The opinion of the Court of Appeals below is reported as Chemehuevi Indian Tribe v. California State Bd., 800 F.2d 1446 (9th Cir. 1986). A copy of the opinion is attached to this petition as Appendix A.

JURISDICTION

The opinion of the Court of Appeals was issued on September 26, 1986. A petition for rehearing was filed on October 12, 1986 and denied on December 2, 1986.

This petition is timely filed within 90 days of December 2, 1986. Jurisdiction of this Court is invoked under Title 28 of the United States Code, sections 1254(i) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3 of the Constitution of the United States vests in the Congress of the United States the power "[t]o regulate commerce

with foreign nations, and among the several States, and with the Indian Tribes, ..."

The Indian Financing Act is codified in Title 25 of the United States Code, Sections 1451 et seq. A copy of the Indian Financing Act is attached to this petition as Appendix D.

The federal regulations promulgated by the Secretary of the Interior under the Indian Financing Act are codified in Title 25 of the Code of Federal Regulations, Part 101. A copy of the regulations are attached to this petition as Appendix E.

The applicable provisions of the Indian Reorganization Act are codified in Title 25 of the United States Code, Sections 462 et seq. A copy of the applicable provisions of the Indian Reorganization Act are attached to this petition as Appendix F.

California Revenue and Taxation Code, Sections 30106 and 38006 et seq. are attached to this petition as Appendix G and H respectively.

STATEMENT OF THE CASE

This suit was filed on December 15, 1977, by the Chemehuevi Indian Tribe ("Tribe"), in order to prevent the State of California ("State"), through its Board of Equalization ("Board"), from summarily seizing and selling the Tribe's real and personal property and from otherwise interfering with the operation of the Tribe's federally sponsored business enterprise on the Chemehuevi Indian Reservation ("Reservation").

Since time immemorial, the Tribe has resided in the Chemehuevi Valley desert along the Colorado River, in the area which is now part of the Reservation. The Tribe is the beneficial owner of the Reservation, which comprises approximate-

ly 32,000 acres of land, legal title to which is held by the United States of America in trust for the benefit of the Tribe.

The Chemehuevi Tribal Council is the governing body of the Reservation and is recognized as such by the United States government through the Secretary of the Interior.

The Tribe is organized under Section 16 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. §476. In 1976, pursuant to the Indian Reorganization Act, the Tribe adopted a constitution which, as subsequently amended, was approved by the Secretary of the Interior on April 21, 1977. Under that constitution, the Tribe is vested, inter alia, with the power to levy taxes and fees, and with all other powers necessary to promote the welfare of its people.

In 1976, the Tribe determined that

the interests of the Tribe and its members would best be served by the economic development of its only tangible asset, the lands and resources of the Reservation, and that this objective would be realized most readily by the purchase of the assets and facilities of Havasu Landing Inc. ("Landing"), a functioning business consisting primarily of a resort, marina, restaurant, grocery store and other related facilities. The Landing had previously been owned by non-Indians and operated on lands within the boundaries of the Reservation.

Lacking the capital with which to purchase the Landing, the Tribe applied for and received a loan from the Department of the Interior's Indian Reorganization Act Revolving Loan Fund in the amount of $1,200,000.

In May 1978, in order to expand and improve the Landing and to construct a

new mobile home park, the Tribe applied for and received a loan under the provisions of the Indian Financing Act of 1974, 25 U.S.C. §1451 et seq.

Both loans were made by the United States to the Tribe in furtherance of its policies as set forth in, inter alia, the Indian Reorganization Act of 1934, 25 U.S.C. §471 et seq., and the Indian Financing Act of 1974, 25 U.S.C. §§1451 et seq. The policies, as stated in these Acts, are to encourage and facilitate economic development on Indian reservations, and to foster Indian self-determination by strengthening Indian tribal governments.

In order to maintain the financial integrity of the Revolving Loan Fund, the Secretary has promulgated a regulation (25 C.F.R. §101.13) which requires that loans made from the Fund must ordinarily be secured by collateral or security

sufficient to ensure repayment.

Pursuant to 25 C.F.R. §101.13, and as security for its two loans, the Tribe assigned to the United States all the assets of both the Landing and the mobilehome park, and all present and future income from said enterprises. The Tribe also granted to the United States the right to demand, collect, or sue for said income in its own name or the name of the Tribe. Under the repayment terms of the promissory notes executed by the Tribe, the Tribe has obligated itself to make monthly payments of interest and, later, of principal.

Pursuant to these loan agreements and under the provisions of the Indian Financing Act, the United States Department of the Interior, through the Bureau of Indian Affairs, provides on-going assistance and supervision to the Tribe in the daily management and operation of the

enterprise. Shortly after the Tribe's loan was approved, the Tribe purchased the Landing and began operating the business. At the time the Tribe commenced this action, it conducted the following businesses within the Reservation: a grocery store; bar; restaurant; marina; boathouse, which includes a gas station and tackle shop; campground; motel; wildlife program, which includes the sale of fishing licenses; and a joint partnership for the retail sale of mobile homes. At its grocery store and boathouse the Tribe sells cigarettes at retail, along with a variety of other consumer products.

The Tribe, acting in its governmental capacity, provides the majority of governmental services on the Reservation. The Tribe provides: law enforcement; road construction, repair and maintenance; water purification and distribution; sewage treatment; garbage and solid waste dispo-

sal; public recreation; emergency medical rescue and evacuation and postal service. All of these services are curtailed by lack of revenue.

In an effort to raise revenues to continue to provide and expand governmental services on the Reservation, the Tribe enacted a Business and Cigarette Tax Code which regulates the sale of cigarettes, imposes a tribal cigarette use tax, and provides for the licensing of businesses on federal Indian trust land within the boundaries of the Reservation. Under the Code, the Tribe levies a tribal use tax, equal to that of the State's cigarette tax, upon the use and consumption of cigarettes and other tobacco products on the Reservation.

After enacting its Business and Cigarette Tax Code, the Tribe stopped collecting and remitting to the Board the State's cigarette sales or use tax.

Prior to the enactment of its tax code, the Tribe, in order to provide essential governmental services to tribal members and non-members who resided, worked on, or visited the reservation, was forced to expend all of the monies earned by the Tribe in its proprietary capacity as owner of the Landing, and even to invade the initial capital of the Landing. This net loss to the Landing of $36,921 per year doomed the Landing to failure and would have resulted in the Tribe's default on its federal loans.

Since enactment of its tax code, the Tribe has been able to meet its governmental obligations with the tax revenues and return the Landing's proceeds to the business, again making possible re-payment of its federal loans.

Assessment of California's cigarette sales or use tax, in addition to the cigarette tax imposed by the Tribe's Ordin-

ance, would double the tax rate on cigarettes purchased on the Reservation, thereby substantially reducing tribal tax revenues and profits to the Tribe and its business enterprise. The Tribe determined in enacting its ordinance that its ability to deliver essential services to persons on the Reservation would be diminished or eliminated if taxpayers were required to pay both the tribal and the state tax.

The State does not apportion its taxes with tribal taxes. Nor does the State grant a credit to persons who purchase two cartons of cigarettes from the Tribe as it does for persons who purchase cigarettes in that amount from all other State and foreign taxing jurisdictions.

On December 9, 1977, David Cordier, a collection representative for the Board, delivered to the Bank of America ("Bank"), at its South Van Nuys Branch, a

"withhold notice" issued pursuant to Revenue and Taxation Code ("R.& T. Code") §30311, advising the Bank that the Board had determined that the Tribe was delinquent in the payment of taxes due to the State in the amount of $11,702.95. This notice further requested that the Bank withhold from the Tribe's funds in the Bank's possession the sum of $23,405.90, twice the amount of the claimed tax delinquency.

After service of the withhold notice, the Bank notified the Tribe that it would not release to the Tribe any monies in the Tribe's checking or savings account unless the balance remaining in both accounts after any such disbursement would be more than $23,405.90.

On or about December 6, 1977, the Board recorded liens against all tribal property and assets located in San Bernadino and Los Angeles Counties, including

property held in trust by the United States or purchased with tribal funds, for taxes claimed to be owing and unpaid under R.& T. Code §§30001, et seq.

On or about December 9, 1977, the Board also had a warrant issued to the Sheriff of Los Angeles County directing him to seize and sell such Tribal assets as might be necessary to satisfy the claimed liens.

Faced with the possible loss of its business enterprise and the seizure and sale of its on-Reservation trust property by the State, prior to any judicial determination of the validity of the State's tax, the Tribe had no choice but to commence this action.

By order and formal judgment entered on September 15, 1983, the United States District Court entered judgment in part for the State and Board, denying the Tribe's request for injunctive relief. A

copy of the unpublished opinion of the District Court ("Opinion") is attached as Appendix B. The District Court exercised jurisdiction over the case pursuant to 28 U.S.C. §1362.

On April 12, 1985, the United States Court of Appeals for the Ninth Circuit reversed in part and affirmed in part the judgment of the District Court. This decision is reported at Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization, 757 F.2d 1047 (9th Cir. 1985). From this decision the State filed a timely petition for a writ of certiorari with this Court.

On November 4, 1985, this Court granted the State's petition in part and summarily reversed. The Court's decision is reported at Calif. Bd. of Equal. v. Chemehuevi Indian Tribe, 474 U.S. ___, 106 S.Ct. 289, 88 L.Ed. 2d 9 (1985).

On November 27, 1985, the Tribe

filed a timely petition for rehearing which this Court denied on January 13, 1987.

On September 26, 1986 the Court of Appeals on remand affirmed the decision of the District Court. On December 2, 1986 the Court of Appeals denied the Tribe's petition for rehearing. A copy of the Order denying the petition for rehearing is attached to this petition as Appendix C.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Issues That Have Never Been, But Should Be Decided By This Court.

A. When A State And An Indian Tribe Impose An Identical Tax, In the Exact Amount On The Same On-Reservation Sales Transactions To Non-Tribal Members This Court Should Decide Whether The Commerce Clause Requires The State To Credit Against Its Own Tax The Amount Of The Tribe's Tax.

In defining the negative implications of the Commerce Clause for state taxation, this Court has emphasized two related but distinct consequences of

state taxation, either of which renders a particular tax unconstitutional: (1) discrimination against out-of-state commerce in favor of local competitors, and (2) cumulative burdening of interstate commerce by several states' collection of similar taxes. Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938); Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

In Henneford v. Silas Mason Co., 300 U.S. 577 (1937), this Court sustained a compensating use tax imposed by Washington which granted a tax exemption for anyone who had paid a sales or use tax in another state. Henneford v. Silas Mason Co., supra, 300 U.S. at 581. Although the Court reserved ruling on the question of whether a state which imposed a compensating use tax would be constitutionally required to give credit for sales or use taxes paid on the same goods in ano-

ther state, Id., at 587, most states have concluded that such credit is required. As of 1971, 30 states and the District of Columbia were giving credit in their compensating use tax for sales taxes paid in other states, and 12 states were providing reciprocal credit for sales taxes paid in those states which also provide credit.

Although this Court has not yet had occasion to rule whether such credit must be given, the Court noted in Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977), that the Washington tax in Henneford was sustained because of the "equal treatment of interstate commerce" involved in the Washington scheme. The Court stated:

> Equal treatment of interstate commerce, lacking in [the case before the Court] has been the common theme running through the cases in which this Court has sustained "compensating" state use tax-

> es. In Henneford v. Silas Mason Co., 300 U.S. 577 (1937), Washington imposed a 2% sales tax on all goods sold at retail in the State. Since the sales tax would have the effect of encouraging residents to purchase at out-of state stores, Washington also imposed a 2% "compensating tax" on the use of goods within the State. The use tax did not apply, however, when the article had already been subjected to a tax equal to or greater than 2%. The effect of this constitutional tax system was nondiscriminatory treatment of in-state and out-of-state purchases.

429 U.S. at 331. (Emphasis added).

More recently in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (Colville) the tribes, as the Chemehuevi Tribe does here, argued that the Commerce Clause required the State of Washington to credit against the state tax, the amount of tribal taxes paid by persons purchasing cigarettes on the various reservations. In addressing the tribes'

argument, this Court expressly recognized that the Indian Commerce Clause would have a "role to play in preventing undue discrimination against, or burdens on, Indian commerce". Colville, supra, at 157.

This Court went on to state that in order to invoke the protections of the Clause, the tribes had the initial burden of proving that if a credit for tribal taxes were given by the state, sales "would occur on the Reservation because of its location and because of the efforts of the Tribes in importing and marketing the cigarettes". Id. at 158.

In Colville this Court held that the tribes simply did not sustain their burden of proof under the Commerce Clause.

> We cannot fault the State for not giving credit on the amount of tribal taxes paid. It is argued that if a credit is not given, the tribal retailers will actually be placed at a competitive dis-

> advantage, as compared to retailers elsewhere, due to the overlapping impact of tribal and state taxation. While this argument is not without force, we find that the Tribes have failed to demonstrate that the business at the smoke shops would be significantly reduced by a state tax without a credit as compared to a tax with a credit.
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> * * * *
>
> ...the Tribes have not shown whether or to what extent this would be the case and we cannot infer on the present record that by failing to give a credit Washington impermissibly taxes reservation value by deterring sales that, if credit were given, would occur on the reservation because of its location and because of the efforts of the Tribes in importing and marketing the cigarettes. (Emphasis added).

Id. at 157-158. Unlike the tribes in Colville, the Chemehuevi Tribe has met its burden of proof as to both elements of the Colville test.

First, the Tribe is not marketing an exemption from state taxation. As the District Court expressly held, what at-

tracts people to the Reservation is not an exemption from state taxation, but the location of the Reservation and the recreational activities the Tribe has to offer. Opinion, Appendix B, at page 29-30.

Second, the Chemehuevi Tribe, unlike the tribes in Colville, has proven by expert testimony that the imposition of the State's tax, in addition to that of the Tribe, will have the practical effect of reducing sales of cigarettes from the Tribe's business enterprise. Opinion, Appendix B, at page 32. Since the Tribe met its initial burden of proof as required by Colville, the lower court should have shifted the burden to the State to prove: (1) that it had a sufficient nexus to the Reservation; 2) that its tax did not discriminate against Indian commerce; (3) that its tax was fairly apportioned; (4) that its tax bore

a fair relation to services provided by the State; (5) that imposition of the State tax did not create a substantial risk of multiple taxation, apportionment notwithstanding; and (6) that imposition of the tax did not prevent the Federal Government from speaking with one voice in regulating commercial relations with [Tribal] governments. Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

Under the California statutory scheme, the State provides a variety of credits and exemptions to persons who pay cigarette taxes to other state and foreign taxing jurisdictions.

The State provides a blanket exemption from its cigarette tax for anyone who brings 400 cigarettes (2 cartons) or less into the State. Cal. Revenue and Taxation Code §30106 (Wests 1979); 18 Cal. Administrative Code §4091. The

State does not exempt from its tax, cigarettes purchased on the Reservation, thereby making sales by instate Indian tribes the only transactions in which purchasers who buy and transport their own cigarettes will be required to pay the tax on purchases of less than 2 cartons.

In addition, the State of California has ratified the Multi-State Tax Compact, which requires the state to give credit for sales and use taxes paid to other member states. R. & T. Code §38006 et seq., at Article V, See Appendix I.

Yet the State does not provide any credits or exemptions to any persons who pay taxes to the Chemehuevi Tribe. Thus, in the present case both the State and the Tribe are levying an identical tax in the exact amount on the same on-reservation transactions. By levying such a tax without a credit, the State provides a

strong incentive to its taxpayers to avoid engaging in cigarette trade with the Tribe since they will be penalized by being forced to pay a higher total tax than if they transact business off the reservation. Such discrimination by the State is prohibited; it violates the constitutional premise that "equal treatment for in-state [on-reservation] and out-of-state [off-reservation] taxpayers similarly situated is the condition precedent" for a valid state tax on transactions protected by the Commerce Clause. See, Halliburton Oil Well Cement Co. v. Reily, 373 U.S. 64, 70 (1963).

B. This Court Should Decide Whether The Imposition Of A State Tax On Reservation Sales, The Full Measure Of Which Has Already Been Taxed By The Tribe, Constitutes A Multiple Tax Burden Which Discriminates Against Indian Commerce.

Indian commerce, like interstate commerce, cannot be subjected to the burden of multiple taxation. Gwin, White

and Prime, Inc. v. Henneford, 305 U.S. 434, 438-39 (1939); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 157 (1980). Although Indian commerce, like interstate commerce, may be made to "pay its own way," Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 461-62 (1959), a state may not "impose a tax which discriminates against Indian commerce either by providing a direct commerical advantage to local business ... or by subjecting Indian commerce to the burdens of 'multiple taxation.'" Northwestern States Portland Cement Co. v. Minnesota, supra, 358 U.S. at 461-462. Even a tax which does not discriminate against Indian commerce when viewed in isolation or on its face, is nevertheless invalid under the Commerce Clause if it places on Indian commerce

> burdens of such a nature as to be capable ...of being im-

> posed, ...or added to, ... with equal right by every state which the commerce touches, ... so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.

Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 255-56 (1938).

In the present case both the State and the Tribe seek to impose a use tax in the amount of $.10 per package ($1.00 per carton) on the consumption of cigarettes on the Reservation.

The economic effect of superimposing the state tax on the tribally-taxed sales of cigarettes will be that cigarette taxes totalling $.20 per package ($2.00 per carton) will be imposed on cigarettes sold on the Reservation while off-Reservation sales will be subject only to the $.10 state tax. Indian cigarette commerce would thus be subjected to a double tax burden to which intrastate, inter-

state and foreign cigarette commerce is not exposed. The state's taxing authority cannot be applied to effect such a result consistent with the Commerce Clause decisions of this Court. Standard Oil v. Peck, 342 U.S. 382 (1952); Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

II. The Decision Below Conflicts With The Controlling Decisions Of This Court.

A. The Ninth Circuit Court Of Appeals Failed To Apply The Balancing Test Established By This Court In New Mexico v. Mescalero Apache Tribe For Determining Whether State Law Has Been Preempted By Federal Law.

This Court has established two separate tests for determining when a state law has been preempted by federal law. First, the Court has held that where Congress has enacted a comprehensive legislative scheme regulating a particular activity, any additional burdens imposed by a state on that same

activity are preempted. Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685 (1965).

Second, this Court has held that a state law is preempted when it frustrates, impedes or conflicts with the overall purposes and goals established by Congress in federal legislation. Hines v. Davidowitz, 312 U.S. 52 (1941).

In determining whether a state law conflicts with the overall policies embodied in a federal statute, this Court has directed the lower courts to make a "particularized inquiry into the nature of the state, federal and tribal interests at stake". New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983) ("Mescalero"). State jurisdiction "is preempted by the operation of federal law if it interferes or is incompatible with the federal and tribal interests relfected in federal law, unless the state

interests at stake are sufficient to justify the assertion of state authority". Mescalero, supra, 462 U.S. at 334.

In balancing these interests to determine whether state jurisdiction has been preempted by the operation of federal law, this Court in Mescalero, stated:

> ...both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodies [sic] in numerous federal statutes. We have stressed that Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging "tribal self-sufficiency and economic development." [citation omitted]. In part as a necessary implication of this broad federal commitment, we have held that tribes have the power to manage the use of their territory and resources by both members and non-members, [citation omitted], to undertake and regulate economic activity within the reservation, [citation omitted], and to defray the cost of governmental services by

> levying taxes. Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of state authority must be viewed against any interference with the successful accomplishment of the federal purpose. (Emphasis added).

Id. at 335-336.

In rejecting the Tribe's argument that the Indian Reorganization Act, 25 U.S.C. §§461 et seq., and Indian Financing Act, 25 U.S.C. §§1451 et seq., preempted the state's cigarette tax law, the court below stated that "neither statute contains any specific provisions relating to or limiting a state's authority to tax transactions involving non-Indians". The Chemehuevi Indian Tribe v. California State Board of Equalization, et al., 800 F.2d 1446, 1448 (9th Cir. 1986) (Chemehuevi II), See Appendix A. Based on this fact and relying upon Colville the lower court held that "the fact that the Tribe's enterprises were

financed pursuant to these statutes does not insulate tribal sales activities from any state involvement." Chemehuevi II, supra, 800 F.2d at 1448. See, Appendix A.

The court below failed to make the particularized inquiry required by this Court in Mescalero. By failing to balance the respective federal and tribal interests against the interests of the state, the court below never determined if the state law stood "as an obstacle to the accomplishment of the full purposes and objectives of Congress" as embodied in the Indian Reorganization and Indian Financing Acts. Mescalero, supra, at 336.

The lower court's reliance on the fact that neither Act, "contains any specific provision relating to or limiting the state's authority to tax transaction involving non-Indians", directly

contradicts this Court's holding in Mescalero. There this Court stated:

> "By resting preemption analysis principally on a consideration of the nature of the competing interests at stake, our cases have rejected a narrow focus on congressional intent to preempt state law as the sole touchstone. They have also rejected the proposition that premption requires "'an express congressional statement to that effect.'" (Emphasis added).

Nor does this Court's decision in Colville, support the lower court's decision regarding the preemptive effect of the Acts.

In Colville, the tribes licensed individual Indians, none of whose smokeshops were established or operated with funds from the Indian Revolving Loan Fund, to sell cigarettes on their respective reservations. The tribes argued, however, that the general policies embodied in the Acts were sufficient in and of themselves to preempt the state's

cigarette tax law. This Court rejected that argument.

In this case, on the other hand, the Chemehuevi Tribe established its business enterprise under the specific provisions of the Indian Reorganization and Indian Financing Acts. These Acts regulate the Tribe's business enterprise in a manner that was never considered by this Court in Colville. In fact this Court has never addressed the preemptive effect of the policies and goals embodied in the Acts and the detailed regulations adopted to implement them.

The goal of the Acts, and therefore the federal interest, is to provide capital to Indians "to help [them] develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they

will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." 25 U.S.C. §1451; See Appendix D.

Both the Federal Government and the Tribe have a related interest in preventing the State from imposing additional financial burdens on the Tribe's business enterprise. The assessment of the State's taxes would deprive the Tribe of the revenue that it needs to repay its loan obligations to the United States. Moreover, it will deprive the Tribe of the tax revenues needed to provide essential governmental services on the Reservation.

In addition, the Federal Government has an interest in ensuring that the policies and goals embodied in the Indian Financing Act and Indian Reorganization Act of promoting tribal self-government

and economic self-sufficiency are fulfilled.

By comparison, the State's interest in this case is minimal. It seeks to tax on-reservation transactions and divert those revenues away from the reservation to local county and city governments. Contrary to the State's assertion that its taxes are justified by both on and off-reservation services, this Court must presume that the state tax revenues derived from off-reservation activities subject to state taxation are adequate to reimburse the State for the services it provides off the Reservation. Ramah Navajo School Board, Inc. v. Bureau of Revenue, 458 U.S. 832, 884, n. 9 (1982). To justify the imposition of its tax on the reservation, the State must point to functions or services performed by the State "in connection with the on-reservation activity" (i.e. the retail sale of

cigarettes). Mescalero, supra, at p. 336.

The State does perform two services on the Reservation in connection with the on-reservation activity: (1) law enforcement and (2) maintenance of approximately two miles of road on the Reservation. The Tribe on the other hand provides four governmental services on the Reservation in connection with the on-reservation activity: (1) law enforcement; (2) maintenance of twenty-four miles of road; (3) water purification and distribution, and (4) garbage collection and disposal.

The State has some interest in taxing these transactions in order to provide services on the Reservation. But the Tribe's interest is greater since it is providing the lion's share of government services on the Reservation. Thus, the State's interest is insufficient to override the combined interests of the

United States and the Tribe in strengthening the Tribe's government, providing essential governmental services on the Reservation and ensuring the financial success of the Tribe's business enterprise.

The lower court never balanced these respective interests to determine whether state law as applied in the context of this case "stands as an obstacle to the accomplishment and the full purposes and objectives of Congress" as embodied in the Indian Reorganization and Indian Financing Acts.

For this reason alone, the Tribe's Petition for Writ of Certiorari should be granted.

B. The Ninth Circuit Court Of Appeals Failed To Properly Apply The Balancing Test Established By This Court In Washington v. Confederated Tribes Of The Colville Indian Reservation For Determining Whether Imposition Of The State Tax Law Constitutes An Impermissible Interference With Tribal Self-Government.

In its opinion, the lower court mistakenly concluded that "we must uphold the district court's determination that the State's legitimate interest in raising revenue to provide substantial services, both on and off the reservation, outweighs the Tribe's interest in deriving income from cigarettes imported to the reservation and resold on the reservation to non-Indians." Chemehuevi II, supra, 800 F.2d at 1449-50; See Appendix A.

As this Court has stated numerous times, to justify the imposition of its tax on the Reservation, the State must point to functions or services performed by the State "in connection with the on-Reservation activity." Mescalero, supra, 462 U.S. at 336. In assessing the State's interest, the court below should have looked only to those services that the State provided in connection with the retail sale of cigarettes on the Reserva-

tion. As stated supra in part II(A), the only on-Reservation services that the State provides in connection with the sale of cigarettes on the Reservation, are the maintenance of two (2) miles of road and minimal law enforcement. The State's interest in providing these two services however, is insufficient to overcome the combined interest of the Tribe and Federal Government. Part II (a), supra. This is particularly true when, as here, the States' tax is directed at "on-reservation value."

The District Court expressly found that the sales of cigarettes on the Reservation had Reservation value and that the Tribe was not marketing an exemption from State taxation. Opinion, Appendix B, p. 29. As the Tribe demonstrated in part II(a), supra, it is providing the greater portion of the governmental services "in connection with

the on-reservation activity". Even if the State and the Tribe provided an equal amount of governmental services, the fact that the activity sought to be taxed has on-reservation value must tip the balance of interests in favor of the Tribe. Where, as here: (1) the Tribe is providing the majority of local governmental services; (2) the activity taxed has on-reservation value; and (3) the Tribe's interest is combined with the substantial interest of the Federal Government in insuring the recovery of its loans to the Tribe, fulfilling its goals of strengthening Indian self-determination, and encouraging Tribal economic development, the State tax infringes upon tribal self-government.

Despite these facts, the court below refused to find that the imposition of the State tax constituted an infringement on tribal self-government. The lower

court seemed to base this holding on the fact that the Tribe was not developing and marketing a tribal resource but was, instead, importing a finished product and reselling it to residents and visitors. Chemehuevi II, supra, 800 F.2d at 1449, See, Appendix A. This Court's decision in Colville, however, does not require that the product sold by the Tribe must be derived directly from a natural resource of the Reservation. Rather, all that Colville requires is that the product has on-reservation value. Therefore, the only factors the lower court should have considered in determining what weight to give to the respective interests involved were: (1) whether the tax was directed at an activity that had on-reservation value and (2) whether the taxpayer was the direct recipient of tribal or state services. Colville, supra, 447 U.S. at p. 157.

The lower court misapplied the Colville balancing test by not giving sufficient weight to the Tribe's interest and by considering factors never contemplated by this Court in Colville. The decision of the lower Court conflicts with the decision of this Court in Colville and therefore, the Tribe's Petition for a Writ of Certiorari should be granted.

CONCLUSION

This case raises important jurisdictional issues pertaining to the constitutionality of the State's cigarette tax law. No court, since this Court's decision in Colville, has addressed the preemptive effect of the Indian Commerce Clause. Until this issue is specifically addressed, Indian tribes will continue to challenge state taxation of tribal sales to non-Indians on constitutional grounds.

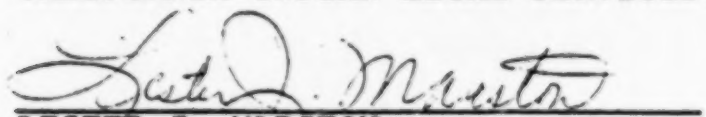
This case also presents an issue of first impression. No court, other than the lower court, has ever considered the preemptive effect of the Indian Financing Act. Contrary to the lower court's decision, this Court in Colville never addressed, nor did it decide, whether the Indian Financing Act would preempt state taxation of sales made by a tribal enterprise established and operated under the provisions of the Act.

Because this case raises important constitutional issues of first impression, and for the other reasons stated above, this Court should grant the Tribe's Petition for Writ of Certiorari.

Dated: February 27, 1987

Respectfully submitted,

CALIFORNIA INDIAN LEGAL SERVICES



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Attorneys for Petitioner
Chemehuevi Indian Tribe

APPENDIX A

UNITED STATES COURT OF APPEALS
Nos. 83-2431 and 83-2481
D.C. NO. 77-2838 RFP
FOR THE NINTH CIRCUIT

The Chemehuevi Indian Tribe,
Plaintiff/Appellant/Cross-Appellee,

vs.

California State Board of Equalization,
et al.,
Defendants/Appellees/Cross-Appellants.

[Filed Sept. 26, 1986]

OPINION

Appeal from the United States
District Court for the Northern
District of California
Hon. Robert F. Peckham, District Judge,
Presiding
Argued and Submitted July 17, 1986 -
San Francisco, California

BEFORE: SCHROEDER, FLETCHER, and REINHARDT, Circuit Judges.

FLETCHER, Circuit Judge:

Plaintiff Chemehuevi Indian Tribe challenged the State of California's authority to impose a state cigarette tax on cigarettes sold by the Tribe on the Chemehuevi Reservation to non-Indians. The district court ruled in favor of the state,

concluding that the legal incidence of the tax fell upon the non-Indian purchasers, that application of the state tax was not preempted by federal statutes, that the tax did not unduly interfere with tribal self-government, and that the tax did not impermissibly burden Indian commerce. 1/ On appeal, we reversed the district court's holding on the first of these issues, ruling that the incidence of the state tax fell upon the Tribe and that the tax was therefor unlawful. Chemehuevi Indian Tribe v. California State Board of Equalization, 757 F.2d 1047, 1057 (9th Cir. 1985). On a petition for a writ of certiorari, the Supreme Court reversed, holding that the legal incidence of the tax fell on the non-Indian purchasers of cigarettes, and not on the Tribe. California State Board of Equalization v. Chemehuevi Indian Tribe, 106 S. Ct. 289, 290 (1985). Now addressing the Tribe's remaining claims of federal

preemption, interference with tribal self-government, and burden on Indian commerce, we affirm.

A. Federal Preemption

The Tribe financed the purchase of its business enterprises with a loan from the Department of the Interior's Revolving Loan Fund, established under the Indian Reorganization Act, 25 U.S.C. §§461-479. To finance improvements to its businesses, the Tribe obtained a second loan under the Indian Financing Act of 1974, 25 U.S.C. §§1451-1543. The Tribe contends that the ability of the state to impose its cigarette tax on non-Indian purchasers on the reservation is preempted by these two federal statutes. We disagree.

The Indian Reorganization Act and the Indian Financing Act are both statutes of broad general applicability. Through these statutes, Congress has demonstrated its support for principles of tribal self-

government and economic development, but neither statute contains any specific provisions relating to or limiting a state's authority to tax transactions involving non-Indians. The fact that the Tribe's enterprises were financed pursuant to these statutes does not insulate tribal sales activities from any state involvement. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980). We are bound by Colville's holding on this point.

The Tribe also argues that the state cigarette tax is preempted by the Buck Act, 4 U.S.C. §§105-110, which provides in part: "Nothing in [this Act] shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed." Id. §109. However, this provision, by its terms, goes no further than to preserve existing exemptions from taxation. The Supreme Court has observed that "the Buck

Act itself cannot be read as an affirmative grant of tax-exempt status to reservation Indians." McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 177 (1973).

Cases in which federal preemption has been found are distinguishable from the case at bar. In each, the Supreme Court found comprehensive and detailed federal involvement in or regulation of the particular tribal activity. See Ramah Navajo School Board, Inc. v. Bureau of Revenue, 458 U.S. 832, 839 (1982) ("Federal regulation of the construction and financing of Indian educational institutions is both comprehensive and pervasive."); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980) ("the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber"); Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160, 166 (1980) ("by enacting [the Indian trader] statutes

Congress 'has undertaken to regulate reservation trading in . . . a comprehensive way'") (quoting Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685, 691 n. 18 (1965).).

We conclude that Congress, in enacting the Indian Reorganization Act, the Indian Financing Act, and the Buck Act, did not foreclose a state tax on sales of cigarettes to non-Indians. The Tribe's preemption argument accordingly fails.

B. Interference With Tribal Self-Government

The Tribe next argues that imposition of the state cigarette tax on sales to non-Indians on the reservation impermissible interferes with the ability of the Tribe to govern itself. According to the Tribe, its legitimate interest in raising revenue to provide governmental services outweighs any state interest.

The doctrines of federal preemption and tribal self-government are "independent but

related barriers to the assertion of state regulatory authority over tribal reservations and members." Bracker, 448 U.S. at 142. "[I]f the state action is not preempted by federal legislation or treaty, the state need only satisfy the test laid down in Williams v. Lee, 358 U.S. 217 (1958), that state action must not infringe on the rights of reservation Indians to govern themselves." Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1109 (9th Cir. 1981), amended, 665 F.2d 1390 (9th Cir.), cert. denied, 459 U.S. 916 (1982). "Th[is] principle of tribal self-government . . . seeks an accommodation between the interests of the Tribe[] and the Federal Government, on the one hand, and those of the State, on the other." Colville, 447 U.S. at 156. In the case at bar, we must balance the state's interest in applying its cigarette tax to on-reservation sales to non-Indians against the impact from the

tax's imposition on the Tribe's ability to govern itself effectively. See Crow Tribe, 650 F.2d at 1115.

The state's interest consists of its general desire to raise revenue to fund state-provided services, both on and off the reservation. The district court found that "[t]he state provides substantial services on the reservation," citing the state's contribution toward highways, education, transportation, and law enforcement. Both non-Indian residents of the reservation who purchase cigarettes from the Tribe and non-resident purchasers who visit the reservation benefit from these services. Furthermore, over three-fourths of those who buy cigarettes on the reservation reside off the reservation, the vast majority of these within California. These individuals benefit from the full array of services provided by the state to its residents and visitors.

The Tribe similarly has an interest in raising revenue to provide tribal services on the reservation. The district court found that the Tribe provides water, law enforcement, sanitation, highway, fish and wildlife, housing, community welfare and recreation, and postal services. Income from the tribal cigarette tax constitutes a portion of the monies used to fund these services. Resident and non-resident purchasers of cigarettes benefit from these tribally-provided services.

The federal government has an interest as a consequence of the general federal goals of strengthening Indian governments and encouraging tribal economic development. The federal government also is actively involved in the Chemehuevis' businesses and has an interest in recovery of the loans made to the Tribe.

The Tribe urges that this case is unlike Colville, in which the Supreme Court

found no impermissible interference, because the Chemehuevis market cigarettes as part of a legitimate business enterprise to residents and visitors who also take advantage of the other amenities the Tribe offers. The district court agreed that "[h]ere, it cannot be said that the tax is directed at 'off-reservation' value". Nonetheless, it viewed the case as materially different from cases where states attempted to tax the value of natural resources on an Indian reservation. See Crow Tribe, 650 F.2d at 1117 (coal); White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1281 (9th Cir. 1981) (fish and game). We agree. The Chemehuevis are not developing and marketing a tribal resource; they are importing a finished product by reselling it to residents and visitors. See Cabazon Band of Mission Indians v. County of Riverside, 783 F.2d 900, 906 (9th Cir.), appeal pending, consideration of

jurisdiction postponed, 106 S.Ct. 2888 (1986).

The Tribe urges that imposition of the state cigarette tax will deprive it of badly needed income. However, we have repeatedly held, as has the Supreme Court, that reduction of tribal revenues does not invalidate a state tax. See Colville, 447 U.S. at 157-58; Squaxin Island Tribe v. Washington, 781 F.2d 715, 720 (9th Cir. 1986) ("a state tax or regulation is not invalid merely because it erodes a tribe's revenues, even if the tax substantially impairs the tribal government's ability to sustain itself and its programs"); Crow Tribe, 650 F.2d at 1116; White Mountain Apache Tribe v. Arizona, 649 F.2d at 1282; Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253, 1258 (9th Cir. 1976), cert. denied, 430 U.S. 983 (1977). In the case at bar, the district court found that the Tribe had failed to demonstrate that

without the tax exemption, it would be unable to provide essential tribal services. We have no reason to disturb this finding on appeal.

We thus conclude that we must uphold the district court's determination that the state's legitimate interest in raising revenue to provide substantial services both on and off the reservation outweighs the Tribe's interest in deriving income from cigarettes imported to the reservation and resold on the reservation to non-Indians. Were we to accede to the Tribe's arguments and distinguish Colville on the grounds that in Colville, non-Indian purchasers were attracted to the reservation solely to purchase tax-free cigarettes, we would raise the spectre of drawing distinctions on a case by case basis, relying on such factors to allow or disallow state taxation as whether non-Indian customers resided on or off the reservation, the ex-

istence of other tribal amenities attracting visitors to the reservation, the length of time visitors spent on the reservation, the level of state funding of reservation services, and the amount of tribal effort devoted to marketing the product. We suggest that the Colville court did not intend such distinctions. We hold that the Chemehuevis have not established that state taxation of cigarette sales to non-Indians would impermissible interfere with the Chemehuevis' ability to govern themselves.

C. Burden of Indian Commerce

The Tribe contends that imposition of the state cigarette tax burdens and discriminates against Indian commerce in three ways: the state refuses to apportion its tax by affording a tax credit to purchasers who pay tribal tax, non-Indian purchasers on the reservation are subjected to a multiple tax burden, and the state does not share revenue from the state cigarette tax

with the Tribe. None of these arguments has merit.

Under the Multistate Tax Compact to which California is a party, see Cal. Rev. & Tax. Code §§38001, 38006 (West 1979), California affords a tax credit to persons who pay sales and use taxes to other states that have ratified the Compact. The state also exempts from the state tax small shipments into the state of 400 or fewer cigarettes. Id. §30106. Because the state does not grant similar credits or exemptions to non-Indians who purchase cigarettes on the reservation, the Tribe contends the State has impermissible burdened Indian commerce.

We disagree. An Indian tribe's sovereignty is not that of a state. White Mountain Apache Tribe v. Arizona, 649 F.2d at 1281. The attributes of sovereignty possessed by the Chemehuevi Tribe do not negate the fact that the Chemehuevi Reser-

vation is a part of the State of California. See id. at 1281-82. The tax credit under §38006 is a result of the voluntary Compact entered into by participating states. California need not treat the Chemehuevi Tribe as it treats other states.

Nor does the existence of a multiple tax burden constitute an unconstitutional burden on Indian commerce. See Crow Tribe, 650 F.2d at 1115-16; White Mountain Apache Tribe v. Arizona, 649 F.2d at 1282; Fort Mojave Tribe, 543 F.2d at 1258. As we stated in Fort Mojave Tribe:

> There is no improper double taxation here at all, for the taxes are being imposed by two different and distinct taxing authorities. The tribe faces the same problem as other taxing agencies confront when they seek to impose a tax in an area already taxed by another entity having taxing power.

Id.

Finally, the failure of the state to include the Tribe in its revenue sharing program does not invalidate the state

tax. Under Cal. Rev. & Tax. Code §30462 (West 1979), the state shares a portion of its cigarette tax revenue with some cities and counties. However, just as the Tribe does not stand in relation to California as another state, neither does it stand in relation to California as a local municipal government. Furthermore, only those California cities and counties that imposed their own local cigarette tax as of August 1967 are eligible to participate in revenue sharing. Id. §30462(b)(2). The Chemehuevi Tribe did not institute its cigarette tax until 1977.

In sum, we conclude that the State of California validly may impose its cigarette tax on non-Indian customers who purchase cigarettes on the Chemehuevi Indian Reservation. 2/

AFFIRMED.

(Footnotes)

1. In response to the Tribe's claim, defendant California State Board of Equalization filed a counterclaim for taxes allegedly due. In a separate decision, the district court held that the Tribe's sovereign immunity from unconsented suit constituted a bar to the Board's counterclaim, and accordingly dismissed the counterclaim. Chemehuevi Indian Tribe v. California State Board of Equalization, 492 F.Supp. 55, 61 (N.D. Cal. 1979). On appeal, we affirmed this dismissal, 757 F.2d at 1053, and the Supreme Court declined to review this issue. See 106 S.Ct. at 290.

2. State taxation of goods or services other than cigarettes sold on an Indian reservation would likely raise different considerations.

APPENDIX B

In the United States District Court
for the Northern District of California
No. C-77-2838 RFP

Chemehuevi Indian Tribe,
Plaintiff,

v.

State Board of Equalization, et al.,
Defendants.

[Filed Sept. 15, 1983]

Memorandum and Order

I. INTRODUCTION

In this action, the Chemehuevi Indian Tribe seeks injunctive relief, prohibiting the California State Board of Equalization from attempting to enforce the provisions of the California Cigarette Tax Law, Revenue and Taxation Code § 30001 *et seq.*,[1] against the Tribe. The Tribe further seeks a declaration from this court that any attempts by the Board to enforce its Cigarette Tax Law against the Tribe or against non-members of the Tribe who purchase cigarettes on the Reservation are 1) impermissible in that the Tribe is not a "person" within the meaning of the Tax Law; 2) violative of the Indian Commerce Clause in that the legal incidence of the Tax Law falls on the Tribe; 3) preempted by federal statutes, regulations and policies promoting tribal self-government and tribal economic self-sufficiency on the Reservation; 4) impermissibly interferes with tribal self-government; 5) violative of the Indian Commerce Clause in that the imposition of the tax upon sales of cigarettes by the Tribe to non-Indians on the Reservation imposes a multiple tax burden which discriminates against Indian commerce.

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[1] *See* sections 30003, 30005, and 30013.

II. PROCEDURAL BACKGROUND

The Tribe filed its Complaint for declaratory and injunctive relief on December 15, 1977. The Board had previously determined that the Tribe owed to the state amounts totalling $11,702.95 for taxes the Tribe allegedly should have collected from non-Indian purchasers of cigarettes on the Reservation, including interest and penalties on the taxes owed. The Board then issued a "withhold notice" asking that the Bank of America to withhold from the Tribe's funds twice the amount of the claimed delinquency. It also recorded liens against all tribal property and assets located in San Bernadino and Los Angeles counties, including property held in trust for the Tribe by the United States, and had a warrant issued to the sheriff of Los Angeles county directing him to seize and sell such tribal assets as might be necessary to satisfy the claimed liens. After the Tribe filed its Complaint, the Board filed a counter-claim for the amount of the taxes allegedly owing from the Tribe.

The court granted a preliminary injunction on January 19, 1978, prohibiting the Board from collecting any taxes, past or future, from the Tribe and ordering the Tribe to pay into an escrow account the approximate tax that would be collected from non-Indians, if the California Cigarette Tax Law were to be applied.

The Tribe by its Complaint initially sought monetary damages from the state. However, the Tribe's claim for general and exemplary damages was dismissed with prejudice by stipulation of the parties and approved by the court on March 2, 1979.

Following a trial on stipulated facts, the court vacated the submission by order of July 9, 1979, to await the Supreme Court's decision in *Confederated Tribes of Colville v. Washington.* The court simultaneously modified the preliminary injunction to relieve the Tribe of the obligation to make further deposits into the escrow account pending the outcome of this litigation.

On October 5, 1979, the Tribe filed a motion to reconsider and amend the court's order of July 19, asking either that judgment be entered in favor of the Tribe on the ground that it was not a "person" within the meaning of the Cigarette Tax Law, and that

the law was therefore not applicable to its cigarette sales, or, in the alternative, that the Board's counter-claim be dismissed and the funds in the escrow account be released to the Tribe on the ground that the Tribe, as a sovereign, was immune from unconsented suit. On December 12, 1979, this court held that the Tribe's claim of sovereign immunity was well-founded and ordered that the funds that were held in the escrow account be released to the Tribe.

The Tribe's request for injunctive and declaratory relief on the above issues is the only claim presently before this court. Trial on said claim is based upon a stipulated record. The parties filed a Stipulation of Facts on March 4, 1979, a Supplemental Stipulation of Facts on November 12, 1982, and a Stipulation certifying certain documents and pleadings for the record on February 8, 1983.

III. FINDINGS OF FACT

The Chemehuevi Indian Tribe is a federally-recognized Indian tribe. The governing body of the Tribe is the Tribal Council which is recognized by the United States government through the Secretary of the Interior. The Tribe is the beneficial owner of the Chemehuevi Indian Reservation, comprising approximately 32,000 acres of land; legal title is held in trust by the United States for the benefit of the Tribe. The Tribe is composed of approximately 446 enrolled members, 75 of which currently reside on the Reservation. The remaining pertinent population of the Reservation is composed of approximately 870 non-tribal members (Indian and non-Indian). Of the 447 enrolled members of the Tribe, approximately 170 members reside outside the boundaries of the Reservation within the state of California. These members are eligible to receive all the public services that all state citizens and residents receive from the state, county and city of their residence.

The Reservation is adjacent to Lake Havasu and is located entirely within the state of California. It is situated in San Bernadino County, on the west shore of the Lake, approximately 50 miles by road from Blythe, California, and approximately 70 miles from Parker, Arizona. The shoreline of the Reservation is

approximately 4 miles by water from Lake Havasu City, Arizona. The road leading to the Reservation carries no through traffic to pints other than those on or immediately adjacent to the Reservation. The road leading to the Reservation and two miles of road within the Reservation are maintained by the County of San Bernadino. This road provides access to both Indian and non-Indians who work, reside or visit the Reservation.

The Tribe is organized under section 16 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. ¶ 476, 48 Stat. 987. In 1976, pursuant to the Indian Reorganization Act, the Tribe adopted a constitution which, as subsequently amended, was approved by the Secretary of Interior on April 21, 1977. Under that constitution, the Tribe is vested, *inter alia*, with the power to levy taxes and fees. Art. VI, Sec. 2(h).

The Tribe has enacted a Business and Cigarette Tax Code which regulates the sale of cigarettes, imposes a tribal cigarette tax and provides for the licensing of businesses within the exterior boundaries of the Reservation. On December 17, 1977, the Tribe enacted a detailed Tribal Retail Tobacco Outlets Ordinance which set forth the procedures for the operation of a cigarette outlet owned and operated by the Tribe and levied a tribal excise tax upon the purchase or possession by consumers of cigarettes and other tobacco products. On October 15, 1980, the Tribe enacted a new "Use and Cigarette Tax Ordinance" in order *inter alia*, fully to tax the on-reservation sales of cigarettes. The ordinance went into effect on January 1, 1981. The Tribe at present imposes a tribal tax which is the equivalent of the state cigarette tax.

In June of 1976, the Tribe sought and obtained from the United States Department of the Interior Revolving Loan Fund a loan in the amount of $1,200,000 for the purpose of purchasing the assets and facilities of Havasu Landing, Inc., a functioning commercial enterprise. Shortly thereafter, the Tribe purchased the Landing and began operating the business. At present, the Tribe conducts the following businesses within the Reservation: a grocery store, which includes a tribal retail tobacco outlet, a bar, a restaurant, a marina, a boathouse which includes a gas station, tackle shop, and a tribal retail tobacco outlet, a campground, a

motel, a wildlife program which includes the sale of fishing licenses, and a joint partnership for the retail sale of mobile homes.

In May of 1978, the Tribe sought and obtained under the provisions of the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.*, a loan from the same Loan Fund in the amount of $1,000,000 for the purpose of constructing a mobilehome park within the Reservation.

Pursuant to 25 C.F.R. § 101.13, the Tribe gave, as security for its two loans, an assignment to the United States consisting of all the assets of both Havasu Landing and the mobilehome park now owned and hereafter acquired by the Tribe and all income which now and in the future becomes due to the Tribe from the operation of said enterprises. The Tribe further granted the United States the full right, power and authority, in its own name or in the name of the Tribe, to demand, collect or sue for said income of said enterprises as may be requested from time to time by the Area Director of the Phoenix Area Office, Bureau of Indian Affairs. Under the repayment terms of the promissory notes executed by the Tribe, the Tribe has obligated itself to make monthly payments of interest and, later, of principal.

Pursuant to the loan agreements and under the provisions of the Indian Financing Act, the United States Department of the Interior, Bureau of Indian Affairs, Colorado River Agency, Credit and Finance Branch, supervises the day-to-day operation of the Tribe's business enterprise, in that it: 1) approves the enterprise's budget; 2) approves all modifications thereof; 3) requires the enterprise to have a general plan of operation; 4) approves the enterprise's general plan of operation; 5) requires the Tribe to retain a manager to run the enterprise; 6) approves the manager's contract; 7) approves the disposition of any property; 8) reviews the monthly financial statements of the enterprise; 9) attends the Advisory Board and Tribal Council meetings convened to discuss any business relating to the enterprise; 10) reviews the enterprise to conduct an annual audit which is submitted to the Agency for approval. In addition to the above, the Agency provides on-going technical assistance to the Tribe's enterprise in the areas of accounting and fiscal management.

The Tribe maintains one general checking account. From this account the Tribe pays all of its obligations including repaying its loan obligations to the federal government and funding tribal governmental services. All monies received from the operation of the Tribe's business enterprise, including tribal cigarette taxes, are deposited in this account. The Tribe maintains a separate record of the taxes and profits it collects on the sale of cigarettes. The Tribe uses the cigarette taxes to provide tribal services. It uses the profits from the sale of cigarettes to repay its loan obligations to the United States. The revenues generated by tourism are the primary sources of revenue for the Tribe.

The state of California, pursuant to Cal. Rev. & Tax Code § 30101, imposes a tax on the distribution of cigarettes within the state in the amount of $.10 per pack or $1.00 per carton. The state has attempted to impose this tax upon the sale of cigarettes by the Tribe to non-Indians on the Reservation. Pursuant to Rev. & Tax Code §§ 30461 and 30462, all amounts required to be paid to the state are transmitted to the State Treasurer to be deposited in the State Treasury to the credit of the Cigarette Tax Fund. Some of these funds are disbursed amongst cities and counties, but none is allotted to the Tribe.

In an attempt to ascertain the impact of this state taxation, which does not allow a credit for commensurate tribal taxation, the California Indian Legal Services contracted with the Survey Research Center of the University of California, Berkeley, to design and conduct a survey to determine the effect of imposing the state's cigarette tax on sales of cigarettes sold and taxed by the Tribe on the Reservation. The results of this survey are described in section D, *infra*.

III. CONCLUSIONS OF LAW

A. Definition of the Term "Person"

The California Cigarette Tax Law defines a "person" who is subject to the "tax on distributors" imposed by that law as:

> Any individual, firm, copartnership, joint venture, association, social club, fraternal organization, corporation, estate,

> trust, business trust, receiver, trustee, syndicate, this State, any county, city and county, municipality, district, or other political subdivision of the State, or any other group or combination acting as a unit.

Rev. & Tax Code § 30010. The meaning of the term "person" is a matter of legislative intent. The Tribe contends that the above provision makes no mention of an Indian tribe, and that its language nowhere indicates that it is intended to apply to such a governmental entity, which is distinct from the state and its political subdivisions. Furthermore, the Tribe insists that, under federal law, an Indian tribe is not merely a "group" or a "unit" composed of individuals; instead, an Indian tribe has a specified legal identity as an entity—a domestic dependent nation, a political community which exercises power of self government. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-60 (1832); *Kagama v. United States*, 118 U.S. 375, 381 (1896). Although it concedes that an individual tribal member may be a "person" within the meaning of the statute, the Tribe asserts that a tribe itself cannot; it is an independent quasi-governmental entity which exists separately from its individual members. *Talton v. Mayes*, 163 U.S. 376, 382-84 (1896).

Moreover, the Tribe emphasizes that, had the legislature intended to include all governmental entities within the meaning of section 30010, then the United States would also be so encompassed. Surely the legislature could not have intended this result, the Tribe reasons; therefore, the statute should be interpreted to include only those entities which are listed therein.

We disagree. It is true that statutes are normally to be interpreted as excluding the sovereign, unless it is specifically included, *United States v. Cooper Corp.*, 312 U. S. 600, 604 (1941); however, an Indian tribe is not a sovereign of equal status with the United States but rather is subordinate thereto. Furthermore, the legislature has defined the term "person" inclusively; the definition does not purport to be exclusive. Indeed, the legislature has employed the term "means" rather than "includes" when defining with exclusivity, *see* the definitions of

"cigarette," "in this state," "untaxed cigarette," etc.[2] Therefore, we hold that an Indian tribe is a "person" within the meaning of the California law.

B. Legal Incidence of the Tax

Direct state taxation of tribal property or the income of reservation Indians is preempted by federal law, and hence invalid in the absence of express congressional authorization. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 171-72 (1973); *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104, 1109 (9th Cir. 1981), *as amended*, 665 F.2d 1390 (1982), *cert. denied*, 102 S.Ct. 635 (1981). *See also Bryan v. Itasca County*, 426 U. S. 373, 376-77 (1976); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-81 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

When a federally-conferred immunity is affected by the legal incidence of a tax, a federal court is not bound by a state court's prior characterization of the tax. *First Agricultural Nat'l Bank of Berkshire County v. State Tax Comm'n*, 392 U.S. 339, 347 (1968). A tax "which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser." *Id.* Hence, *First Agricultural Nat'l Bank* held that the legal incidence of a sales tax that required the purchaser to pay the tax to the vendor, required the vendor to add the tax to the sales price and to collect the amount from the purchaser, and established that the tax was to constitute a debt from the purchaser to the vendor, fell upon the purchaser. *See also United States v. Mississippi Tax Comm'n*, 421 U.S. 599, 608 (1975) (test for incidence is whether state requires tax to be passed on to purchaser and be collected by vendor from him). Similarly, in *Diamond National v. State Board of Equalization* 425 U.S. 268 (1976), the Court held that, the state court's contrary determination notwithstanding, the legal incidence of the then-California

[2] The court also held that the state and tribal substantive regulations could be concurrently enforced without violating the right to tribal self-government. This portion of the court's ruling assumedly has been superceded by *Mescalero, supra.*

sales tax, Cal. R.& T.Code ¶ 6052, fell upon the purchaser. That statute provided:

> Collection by retailer from consumer. The tax hereby imposed shall be collected by the retailer from the consumer insofar as it can be done.

1. The *Colville* Case

Recently, the Supreme Court has addressed the concept of legal incidence in the context of state taxation of an Indian tribal retail enterprise. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the Court accepted the conclusion of the district court that the legal incidence of the state cigarette tax there at issue fell upon the non-Indian purchaser. The district court had applied the principle that "where a state requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser," citing *Mississippi Tax Comm'n, supra*, at 608, notwithstanding the fact that the seller was legally liable for the payment of the tax. *Id.* at 607. The district court distinguished the state sales tax, which

> provides that the tax shall be paid by the buyer to the seller, that each seller shall collect the tax from the buyer, . . . that the amount of the tax "shall constitute a debt from the buyer to the seller" . . . . [,] that the tax shall be stated separately from the selling price and not be included in the sales price of an item.

446 F.Supp. 1339, 1352.

By contrast, the cigarette tax lacked similar provisions. The court emphasized particularly "the absence of any provisions requiring that the tax be passed on to the buyer." *Id.* at 1353. Hence, the language of the statute did not inexorably resolve the issue of legal incidence.

In attempting to ascertain the legislature's intent, the court examined two "legislative intent" statutes, applicable only to the cigarette tax, which provided:

> There is levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes, in an amount equal to the rate of six and one-half mills per cigarette.

R.C.W. § 82.24.020.

> It is the intent and purpose of this chapter to levy a tax on all of the articles taxed herein sold, used, consumed, handled, possessed, or distributed within the state and to collect the tax from the person who first sells, uses, consumes, handles, possesses . . . or distributes them in this state. It is also the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event occurring within the state.

R.C.W. § 82.24.080. In an effort to resolve the apparent conflict between these statutes, the court examined other available materials, *i.e.*, state regulations implementing the provisions of the cigarette tax statutes, an opinion of the state attorney general, an opinion of the Washington Supreme Court, and the language of the state legislature's 1975 amendment of the statute. *Id.* at 1353-55. On the basis of these authorities, the court concluded that "the legal incidence could shift depending on the circumstances of the transaction," *id.* at 1355; that is, the first taxable event occurring within the state could be either the sale, handling, possession or distribution of cigarettes by the Indian seller (invalid because the legal incidence fell on an Indian) or the use or consumption of cigarettes by the non-Indian buyer (a valid tax under *Moe*). The court concluded that:

> the legislature's intent [was] to impose the legal incidence of the tax at the earliest constitutional opportunity. Where on-reservation tribal sales to non-Indians are invalid, the first taxable event is, therefore, the use or consumption by the non-Indian purchaser. In such situations, the legal incidence falls upon the non-Indian purchasers rather than the tribal seller.

Id.

By contrast, the language of the state tobacco tax in *Colville* was far less ambiguous, and the court easily concluded that the legal incidence of the tax fell upon the dealer. Of this tax, the court stated:

> A similar conclusion cannot be reached with respect to State's tobacco products tax. . . . [T]he statutory language . . . makes it clear that the legal incidence of the tax falls upon the Dealer. Actually the state imposes two taxes upon specified tobacco products other than cigarettes. . . . The second tax is "upon the sale, use, consumption, handling, or distribution of all tobacco products" in Washington. . . . Unlike the cigarette tax, there is no statutory language imposing the tax upon the first taxable event. Rather the tax is imposed when "the distributor (a) brings, or causes to be brought, into this state from without the state tobacco products for sale." . . . Thus, in both instances the legal incidence falls upon the Dealer and the tax is invalid.

Id. at 1355 n.15.

2. The California Statute

The California taxing scheme provides in part:

> Every distributor shall pay a tax upon his distribution of cigarettes . . . at the rate of five mills . . . [for each cigarette].

R. & T. Code §30101.

> "Distribution" includes 1) the sale of untaxed cigarettes in this state and 2) the use or consumption of untaxed cigarettes in this state.

Section 30008.

> "Use or consumption" includes the exercise of any right or power over cigarettes incident to the ownership thereof, other than the sale of the cigarettes or the keeping or retention thereof for the purpose of sale.

Section 30009.

> "Distributor" includes every person who . . . within the meaning of the term "distribution" . . . distributes cigarettes.

Section 30011.

> "Untaxed cigarette" means any cigarette which has not yet been distributed in such a manner as to result in a tax liability under the tax law.

Section 30005.

> Every distributor engaged in business in this state and selling or accepting orders for cigarettes with respect to the sale of which the tax imposed by Section 30101 is inapplicable shall, at the time of making the sale or accepting the order or, if the purchaser is not then obligated to pay the tax with respect to his distribution of the cigarettes, at the time the purchaser becomes so obligated, collect the tax from the purchaser, if the purchaser is other than a licensed distributor, and shall give the purchaser a receipt therefor in the manner and form prescribed by the board.

Section 30108(a).

> The taxes required to be collected by this section constitute debts owed by the distributor, or other person required to collect the tax.

Section 30108(d).

Section 30108(a) appears to be a mandatory "pass through" provision, the result of which, under *Mississippi Tax Comm'n*, is that the legal incidence of the tax falls upon the purchaser. The cigarette tax scheme is basically composed of a sales tax payable at the wholesale level with a compensating use tax imposed upon persons who use or consume cigarettes when the sale of those cigarettes cannot be subject to the California tax. A vendor of cigarettes, the sale of which is not subject to the California tax, must collect the tax from the user and pay the tax to the state.

The cigarette tax is imposed upon "every distribution"; distribution includes both the sale and the use or consumption of untaxed cigarettes. Thus, in the instant case, since the tax cannot constitutionally be imposed upon Indian vendors, the incidence of the tax, as in *Colville*, falls upon the purchaser, although the Indian tribe remains liable for collection of the tax. It appears, as

in *Colville*, that the Code imposes a tax on the first constitutionally taxable distribution—in this case, the use or consumption of the cigarettes.

Moreover, if the legal incidence of the optionally-worded sales tax at issue in *Diamond National, supra*, was held to fall upon the purchaser as a matter of federal law, then, in light of the apparently mandatory collection requirement imposed by section 30108, the legal incidence of the cigarette tax must surely fall upon the purchaser in this case as well. Admittedly, the statute nowhere refers to the "first taxable event," the phrase emphasized in *Colville*. Nor is there explanatory authority available, as there was in *Colville*. However, we conclude that, in light of the mandatory pass-through language of section 30108(a), the legal incidence of the tax at issue herein falls upon the purchaser.

C. Preemption

1. Supreme Court Authority

In approaching the difficult problem of state taxation, the trend of recent analysis "has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption." *McClanahan, supra*, at 172. *See also Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253, 1255 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). The question of federal preemption is not controlled by standards of preemption developed in other areas. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980).

> Instead, the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional acts promoting tribal independence and economic development, inform the preemption analysis that governs this inquiry.

Ramah Navajo School Bd. v. Bureau of Revenue, 102 S.Ct. 3394 (1982). Congress need not expressly state its preemptive intent; "it is enough that the state law conflicts with the purpose or operation of a federal statute, regulation, or policy." *Crow Tribe, supra*, at 1109. The court must make "a particularized inquiry into the nature of the State, Federal and tribal interests at stake,

an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 1109, *quoting Bracker, supra,* at 149. *See also Ramah, supra,* at 3399.

Several times in recent years, the Court has determined that Congress had so completely occupied a field by virtue of its detailed regulation thereof, that state regulation of the same subject matter was precluded. In *Warren Trading Post v. Arizona Tax Comm'n,* 380 U.S. 685 (1965), the Court held that a federally-licensed Indian trader trading on a reservation was immune from state gross sales or income taxation. Such a tax would, *Warren* emphasized:

> frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts.

Id. at 691. The state was thus interdicted from imposing a tax which would "disturb and disarrange the statutory plan." *Id.*

In *Bracker, supra,* the Court applied these principles in concluding that federal law preempted application of Arizona's motor carrier license and use fuel taxes to a non-Indian logging company's activities on tribal land. The federal regulatory scheme encompassing Indian timber harvesting was sufficiently pervasive to oust additional state regulation. That regulation was embodied in "Acts of Congress, detailed regulations promulgated by the Secretary of the Interior, and day-to-day supervision by the Bureau of Indian Affairs." *Id.* at 145. In *White Mountain Apache Tribe v. Arizona Dept. Game & Fish,* 649 F.2d 1274 (9th Cir. 1981), the Ninth Circuit identified the three factors in *Bracker, supra,* upon which the Supreme Court had based its finding of preemption:

> 1) the comprehensive and pervasive federal regulatory scheme for harvesting and marketing Indian timber left no room for additional state taxes or burdens;

2) "the assessment of state taxes would obstruct federal policies [relating to the profitability and management of the Indian logging enterprise]"; and

3) there was no "regulatory function or service performed by the State that would justify the assessment of taxes," the "general desire to raise revenue" alone being an insufficient justification for taxation here in light of the "significant geographical component to tribal sovereignty," a factor which (although "not absolute") is "important" and "highly relevant" in preemption analysis. *Id.* at 147, 100 S.Ct. at 1586.

Id. at 1278-79.

More recently, in *Ramah, supra*, the Court held that federal law preempts state taxation of the gross receipts received by a non-Indian construction company from a tribal school board for the construction of a school for Indian children on the reservation. Finding the case "indistinguishable" from *Bracker*, the Court concluded that "[f]ederal regulation of the construction and financing of Indian education institutions is both comprehensive and pervasive." *Id* at 3400. The Board had obtained funds for the school facilities from a series of congressional appropriations earmarked for that purpose; the Indian Self-Determination Act specifically declared that the provision of adequate educational services to Indian children was a major national goal, 25 U.S.C. § 450a(c), and that parental and community control of the educational process was of crucial importance. Section 450(b)(3). Pursuant to statutory authority, the Secretary had promulgated detailed regulations concerning school construction, including the monitoring and reviewing of subcontracting agreements.

The additional state tax, although falling nominally on the non-Indian contractor, would have depleted the funds available for school construction, since the tax was included in the bids as a cost of construction, and thus the tribe reimbursed the contractor for the amount of the tax. Such a dissipation of funds would have impeded the federal interest in promoting Indian educational opportunities. Finally, the state did not seek to assess the tax in

return for governmental services it provided to those upon whom the tax was imposed. Thus, although the legal incidence of the tax fell upon the non-Indian contracting firm, the "ultimate burden," *id.* at 1184, fell upon the tribal organization, and the actual impact of that burden was relevant for purposes of preemption analysis. That is, the fact that the legal incidence of a tax does not fall upon the tribe is a necessary but not sufficient consideration in determining its validity *vel non*.

In *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160 (1980), the Court held that the Indian trader statutes preempted the state's jurisdiction to tax the sale, on a reservation, of farm machinery to an Indian tribe by a corporation that did not reside on the reservation and was not licensed to trade with Indians. Although the gross receipts tax was assessed against the seller/corporation, the corporation added the tax to the sale price, thus increasing the total purchase price to the tribe. In both *Central Machinery* and *Ramah*, *supra*, the state provided few on-reservation services to the sellers of the goods and services; the taxes were mere revenue-raising measures, as in *Bracker*. The non-Indians who were subject to the tax did engage in business off, as well as on, the reservation, and the state assumedly provided substantial services to their off-reservation activities. However, the Court stated that the state tax revenues derived from the off-reservation activities would "presumably" be sufficient to reimburse the state for such off-reservation services.

The Court, then, has found federal preemption in areas which have been specifically regulated in a detailed fashion by Congress, or which affect adversely such a particularized regulatory plan. However, the Court has not suggested that such federal preemption exists in the area involved in the case at bar.

In *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), the Court held, *inter alia*, that a state could validly impose a cigarette tax on sales by smokeshops operated by tribal members and located on leased trust lands upon the reservation and that the smokeshop operators could be required to collect the tax (since, in that case, the legal incidence of the tax fell upon the non-Indian purchaser);

> The State may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation. Such a tax may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians.

Colville, supra, at 151 (construing *Moe*). In *Moe,* the Court stated that the "minimal burden," which is imposed upon an Indian tribal seller of cigarettes by the state's requirement that the seller collect a tax validly imposed on a non-Indian, does not violate any congressional enactments dealing with the affairs of reservation Indians. *Moe, supra,* at 483.

In *Colville, supra,* the Court explicitly held that, even when afforded "the broadest reading to which they are fairly susceptible," *id.* at 155, the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.,* the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.,* and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.,* did not preempt the state's sales and cigarette taxes. Despite the fact that these statutes

> evidence to varying degrees a congressional concern with fostering tribal self government and economic development, . . . none goes so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State.

Id.

On the basis of this authority, we conclude that the state's tax in the instant case is not preempted by the general provisions or policies of the previously mentioned federal statutory schemes.

2. Specific Statutes

The Tribe contends that, their general policies aside, the specific provisions and application of the Indian Financing Act and the Buck Act do preempt state law in this case.

a. The Indian Financing Act

As previously noted, the Tribe applied for, and obtained, its loan funds from the United States Indian Revolving Loan Fund in

order to purchase the assets, and to operate the facilities, of Havasu Landing and the mobilehome park. In enacting the Indian Financing Act, the Tribe contends that, as in *Bracker, Ramah,* and *Central Machinery,* Congress has regulated, in a detailed and comprehensive manner, businesses purchased and operated with funds obtained from the Indian Revolving Loan Fund. This Fund was established in order to provide a source of funds for Indians and Indian tribes for the purpose of promoting and improving economic development on Indian reservations:

> Loans may be made for any purpose which will promote the economic development of . . . the Indian organization and its members.

25 U.S.C. § 1462.

> Loans from the Indian Revolving Loan Fund shall be made for purposes which will improve and promote the economic development on Indian Reservations.

25 C.F.R. § 101.2.

> [D]irect loans from the United States will be made . . . to eligible tribes, . . . to finance economic enterprises operated for profit, the operation of which will contribute to the improvement of the economy of a reservation and/or the members.

25 C.F.R. § 101.2(b)(1).

In the case at bar, the *profits* from the sale of cigarettes go to the Tribe in its proprietary capacity as a retailer to repay its loan obligations; the *tax* revenues are received by the Tribe in its governmental capacity to provide governmental services to those persons who reside at, work on, or visit the reservation. Thus, the imposition of the state cigarette tax will allegedly have a two-fold impact: it will impede the efforts of the United States to advance its policies as embodied in the Indian Financing Act and will hinder the ability of the Tribe to repay its loan obligations to the government and to continue to operate the Landing for the economic benefit of the Tribe.

The Indian Financing Act regulations deal with the method of repayment, financing, interest created, title to property, etc., but

do not regulate tribal sales of cigarettes of non-tribal members. This, however, is relevant but not necessarily dispositive. In *Bracker*, the Court struck down Arizona's use fuel tax and motor carrier tax because the imposition of these state taxes was preempted by comprehensive federal regulations concerning the harvesting and sale of timber. The federal regulations did not address the identical subject matter regulated by the state taxes. *See also Ramah, supra,* at 3401 n.5. Hence, federal regulation of a particular subject matter may be sufficiently comprehensive so as to preempt state regulation of collateral matters which affect the federal scheme.

Colville explicitly held that the Indian Financing Act did not preempt the state cigarette tax therein. *Colville, supra,* at 155. However, the Tribe urges that *Colville* merely preemptive effect *vel non* of the *general intent* and purpose of statutes such as the Act. The Court did not analyze the impact of the specific provisions and regulations of that Act in a particular context.

The foregoing notwithstanding, we are not persuaded that the specific involvement of the Indian Financing Act in this case preempts the state tax at issue, that is, that the Act operates to preempt state regulation of *any* particular Indian enterprise funded thereunder. A contrary conclusion would lead to unpredictable, unprincipled and incongruous results. A state would be required to predict and identify, on an *ad hoc* basis, the particular enterprise an Indian tribe might choose to pursue, and the validity of state taxation would vary from reservation to reservation within the state and from time to time within a specific reservation, if the tribe should abandon one enterprise and initiate another. This uncertainty would result from the fact that, unlike the statutes in *Bracker* and *Ramah,* the Indian Financing Act does not single out particular areas of activity—harvesting timber, encouraging education—to regulate or promote. It merely regulates the provision and utilization of federal funds. The Tribe's decision to engage in a specific business alone creates the categorical specificity. We conclude that the mere fact that an Indian enterprise is funded by a federal loan does not automatically preempt state taxation of the income generated by that enterprise.

Our conclusion is not inconsistent with *New Mexico v. Mescalero Apache Tribe*, 51 U.S.L.W. 4741 (June 14, 1983), in which the Court held that state hunting and fishing regulations which conflicted with tribal ordinances regulating in detail the conditions under which both members and nonmembers of the tribe could hunt and fish on the reservation, were preempted by federal law. The Court noted that "concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation." *Id.* at 4745. That authority, the Court emphasized, had been repeatedly affirmed by federal treaties and laws, as well as by prior Court decisions. With extensive federal assistance and supervision, the Tribe had attempted to establish "a comprehensive scheme for managing the reservation's fish and wildlife resources," *id.* at 4741, for the benefit of its members. The Court asserted:

> It is most unlikely that Congress would have authorized, and the Secretary would have established, financed, and participated in Tribal management if it were thought that New Mexico was free to nullify the entire arrangement. Requiring Tribal ordinances to yield whenever State law is more restrictive would seriously "undermine the Secretary's [and the Tribe's] ability to make the wide range of determinations committed to [their] authority. [citations].
>
> The assertion of concurrent jurisdiction by New Mexico not only would threaten to disrupt the federal and tribal regulatory scheme, but would also threaten Congress' overriding objective of encouraging tribal self-government and economic development. The Tribe has engaged in a concerted and sustained undertaking to develop and manage the reservation's wildlife and land resources specifically for the benefit of its members. The project generates funds for essential tribal services and provides employment for members who reside on the reservation. This case is thus far removed from those situations, *such as on-reservation sales outlets which market to nonmembers goods not manufactured by the tribe or its members, in which the tribal contribution to an enterprise is de minimus. See Washington v. Confederated Tribes*, 447 U.S. 134, 154-59 (1980).

Id. at 4745 (emphasis added). In light of the above language, we conclude that "on-reservation value" may be generated by the Tribe's manufacture of a product or its regulation of its own natural resources. However, the mere fact that a tribe borrows money from the federal government in order to engage in a commercial enterprise, and therefore subjects the operation of that enterprise to federal supervision, does not effect *per se* a federal preemption of state regulatory/taxing authority. Moreover, unlike state substantive regulations of hunting and fishing, concurrent state and tribal taxation would not effectively nullify a tribal commercial enterprise.

b. The Buck Act

The Tribe urges that the state's cigarette tax has been preempted by the Buck Act, 4 U.S.C. §§ 105-10. The Act permits states to collect sales, use or income taxes within any federal area, section 105. However, the Act further states:

> Nothing [herein] shall be deemed to authorize the collection of any tax on or from any Indian not otherwise taxed.

Section 109. An opinion of the Solicitor of the Interior Dept. released prior to the passage of the Act, wherein the Solicitor stated that the state could not impose a cigarette tax upon sales of tobacco by Indians on the reservation. He premised this conclusion upon sales of tobacco by Indians on the reservation. However, that opinion does not purport to relate to the specific provisions or purpose of the Buck Act and assumedly has been severely undermined by *Moe* and *Colville.*

The Tribe urges that ambiguous federal statutes enacted for the benefit of Indian tribes are to be liberally construed in their favor, *citing Bryan v. Itasca County, supra,* at 392. The statute at issue, however, is not afflicted with ambiguity. Section 109 merely does not authorize state taxation of Indians not otherwise validly taxed. Indeed, in *Warren Trading Post, supra,* at 691 n.18, the Court stated that the Buck Act does not apply to Indian reservations. Although in *Warren,* the Court struck down a state tax levied upon a federally licensed non-Indian doing business on an Indian

reservation, the Court did not premise this holding on the pre-emptive effect of section 109. It merely invoked that section as a basis upon which to reject the state's argument that the Buck Act granted the state authority to tax under the circumstances of that case. Our research reveals that case law under the Buck Act is sparse, and no court has explicitly held that the Act affirmatively preempts any form of state taxation. The Act merely maintained any existing tax-exempt status the Indians may have enjoyed. *See, McClanahan, supra*, at 176. Indeed, in *McClanahan*, the Court stated that "the Buck Act itself cannot be read as an affirmative grant of tax-exempt status to reservation Indians." *Id.* at 177. The Tribe therefore cannot prevail on this basis.

D. Interference with Tribal Self-Government/Indian Commerce Clause.

1. Supreme Court Authority

In *Williams v. Lee*, 358 U.S. 217 (1959), a non-Indian trader licensed by the federal government attempted to collect a debt owed him by an Indian by bringing suit against the Indian in state court. The Court found that such a suit "would undermine the authority of the tribal courts over Reservation affairs and would infringe on the rights of Indians to govern themselves." *Id.* at 223. In formulating this "infringement test," the Court noted that:

> [A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

Id. at 220. The Court later elaborated upon the appropriate occasions which justify the invocation of this test:

> [C]ases applying the *Williams* test have dealt principally with situations involving non-Indians. . . . In these situations both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

McClanahan, supra, at 179.

Since *Williams*, the Court has acknowledged the test in dictum, *see Bracker, supra*, at 142-43; *Mescalero, supra*, at 4744 n.16; and has applied the principle twice, *see Colville, supra*, and *Moe, supra*, but has not yet found a violation thereof. *See generally*, Mundell, *The Tribal Sovereignity Limitation on State Taxation of Indians*, 15 Loyola L.A.L.Rev. 195 (1982). The Court prefers to rely upon a federal preemption analysis. Only when such preemption is clearly not present, as is the case herein, does the Court resort to the "infringement" test.

The Court has consistently denied that state taxation of non-Indians engaged in on-reservation activity violates the tribal sovereignity limitation. However, in *Colville*, the Court developed a balancing test which may have given further force to the doctrine in situations where the tribe has imposed its own commensurate tax on the same activity. In *Colville*, the Court more specifically described the "infringement" test as requiring the court to balance the respective federal, state and tribal interests. 447 U.S. 156-57. In balancing these interests, the Court recognized that the interests of the tribes "in raising revenues for essential governmental programs" was greatest:

> when the revenues are derived from value generated on the reservation by activities involving the tribes and when the taxpayer is the recipient of tribal services.

Id. On the other hand, the Court indicated that the state's interest in raising revenues is:

> strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

Id. at 157.

Both *Moe* and *Colville* have established that the application of a state cigarette tax to sales of cigarettes by Indians to non-Indians on a reservation, where the legal incidence of the tax falls on the purchaser, does not in and of itself unduly infringe upon tribal self-government, despite the fact that such tax will deprive the tribe of revenue. *Id.* at 158-59. However, *Colville* did not resolve the crucial issue of double taxation, although it did hold that the state need not afford the purchaser a tax credit for tribal

taxes when the tribe is marketing *only* a tax exemption. The Court stated that the argument that the tribe would be placed at an impermissible competitive disadvantage by the overlap of state and tribal taxation "is not without force," *id.* at 157, but found that the tribe had failed to demonstrate *in that case* that their business would have been reduced by a state tax *without* a credit, as compared to a state tax *with* a credit. In *Colville*, even with a credit, on- and off-reservation prices would have been the same, and, since purchasers entered the reservation only because cigarettes were less expensive there, those purchasers would have had no incentive to travel to the reservation if prices there were equivalent. The Court concluded:

> [W]e cannot infer on the present record that by failing to give a credit Washington impermissibly taxes reservation value by deterring sales that, if credit were given, would occur on the reservation because of its location and because of the efforts of the Tribes in importing and marketing the cigarettes.

Id. at 158. Hence, the mere imposition of the state tax without a credit did not contravene tribal self-government under the record and circumstances existing in *Colville*. However, the *Colville* balancing test may be applied to evaluate the legitimacy of state's refusing to afford a tax credit under circumstances which differ from those of *Colville*.

2. Ninth Circuit Authority

We approach the *Colville* balancing analysis with a view to recent Ninth Circuit authority. The Ninth Circuit has applied the *Williams* infringement test quite restrictively when addressing the double taxation issue. In *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977), the court analyzed the validity of a state possessory interest tax imposed on non-Indian lessees of Indian trust land. The tribe, as part of a plan for the economic development of the reservation, had entered into a series of 99-year leases with non-Indian lessees and had also imposed its own possessory interest tax. After determining that the county leasehold interest tax was not preempted by federal law, the court held that the interference

with tribal self-government was not serious enough to invalidate the tax under *Williams*. In upholding the state's right to tax, the court stated:

> The interference with Indian self-government in the instant case is much less serious. No Indian or Indian land is being subjected to direct state court process. The only effect of the tax on the Indians will be the indirect one of perhaps reducing the revenues they will receive from the leases as a result of their inability to market a tax exemption. Such an indirect economic burden cannot be said to threaten the self-governing ability of the tribe.
>
> The assertion that "double taxation," resulting from the imposition of a tax both by the county and the tribe, impairs the ability of the tribe to levy its tax is not persuasive. There is no improper double taxation here at all, for the taxes are being imposed by two different and distinct taxing authorities. The tribe faces the same problem as other taxing agencies confront when they seek to impose a tax in an area already taxed by another entity having taxing power.

Id. at 1258. Hence, *Fort Mojave* indicates that a state tax's indirect, albeit adverse, impact upon a tribe's ability to levy its own tax and thereby to raise revenues does not rise to the level of an infringement on tribal sovereignty. Although it preceded *Colville*, *Fort Mojave* is apparently still "good law" and was recently cited with approval in *Merrion v. Jicarilla Apache Tribe*, 102 S.Ct. 894, 909 (1982).

In more recent decisions, the Ninth Circuit has not departed from its basic position in *Fort Mojave*. In *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274 (9th Cir. 1981), the court held, *inter alia*, that a state could impose nondiscriminatory hunting and fishing license requirements on non-Indians on reservations without violating the right of tribal self-government, even where a double license fee might reduce the revenues of the tribe, if "the state has a substantial conservation interest." *Id.* at 1284. In analyzing the right to tribal self-government, the court stated:

> We hold that the right of tribal self-government extends only to intratribal relations and to concurrent civil authority over visitors to reservations.
>
> When a state has proposed to tax non-Indians for their on-reservation activities, the courts have almost uniformly found the tax permissible, even if the tribe was laying its own tax on the same activities; the consequent reduction of Indian tax and business revenues does not violate the right of tribal self-government. *Colville Cigarettes Case*, 100n S.Ct. at 2082-83; *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d at 1258. Double taxation does not diminish a tribe's authority to tax non-Indians or otherwise regulate them, *Colville Cigarettes Case*. . . . and a tribe has "no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all," *id.*, 100 S.Ct. at 2080 n.27.

Id. at 1284. The court continued:

> [I]t was established in the *Colville Cigarettes Case* that a nondiscriminatory state tax on non-Indians does not violate the right of tribal self-government even if it has the indirect effect of crippling a tribal commercial program; . . . . We do not now decide whether a state tax or fee which, although otherwise valid, renders a tribe so destitute that it cannot finance even the barest essentials of self-government (*e.g.*, the tribal council, court and police) would violate the right.

Id. at 1285 n.13. Thus, a state tax which, imposed without a credit, would severely distrub a tribe's ability to provide essential governmental services may violate the right to tribal self-government. Otherwise, a state regulation will contravene the principle of tribal self-government only if it intrudes upon "intratribal relations."

In *Crow Tribe of Indians v. Montana*, 650 F.2d 1104 (9th Cir. 1981), *as amended*, 665 F.2d 1390 (1982), *cert. denied*, 102 S.Ct. 635 (1981), the court employed the *Colville* interest-balancing test to evaluate a state law which imposed a severance tax on coal produced in the state and a gross proceeds tax on the sale of such coal. Vast deposits of coal underlay the reservation and an adjacent "ceded strip." In an effort to develop these resources, the

Tribe entered into mining leases with several non-Indian companies that embraced the coal beneath the ceded strip. Several years later, the state imposed the above taxes, thereby appropriating to itself most of the economic rent from the coal production. Hence, the state taxes deprived the Tribe of "a large portion of the economic benefits of its coal." *Id.* at 1113.

The Tribe brought suit, seeking injunctive and declaratory relief, alleging that the state taxes were 1) preempted by federal law; and 2) violated the *Williams* infringement test in that the taxes infringed on the Tribe's ability to levy its own severance tax,[3] and deprived the Tribe of the ability to negotiate higher royalties and thereby to generate revenues needed for various tribal programs and services.

The district court had dismissed the Tribe's complaint for failure to state a cause of action. The Ninth Circuit reversed. In addressing the Tribe's allegations, the court rested on both grounds. Although invoking a balancing test in both its federal preemption and tribal self-government analyses, the court distinguished the doctrines:

> The self-government doctrine differs from the preemption analysis in that it specifically prohibits state action that impairs the ability of a tribe to exercise traditional governmental functions such as zoning, . . . vehicle registration, . . . or the exercise of general civil jurisdiction over the members of the tribe. . . .

Id. at 1110. In regard to the impairment of tribal tax argument, the court noted:

> [W]e think that even if the state and tribal taxes were imposed on the same activity, that fact alone would not preclude the state from imposing its tax. Each taxing body is free to impose its tax, since neither tax by its terms precludes the other. [citing *Colville*]. As a practical matter, however, it is true that Montana's tax may force the Tribe to choose

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[3] The Tribe had not yet applied its own severance tax to coal removed from the "ceded strip" of land at issue.

between imposing its tax, thereby discouraging coal mining, or foregoing tax revenues.

Id. at 1115-16. The court further remarked that both arguments (impairment of tribal tax and infringement on self government) raised essentially the same problem: "that of the state's depriving the Tribe of potential revenues." *Id.* at 1116. While accepting as true the allegation that the state tax had a severe economic impact upon tribal government, the court stated that:

> Tribal economic activity, while perhaps providing the wherewithal for tribal governments to sustain themselves, is at best indirectly linked to the effectiveness of tribal government. It is clear that a state tax is not invalid merely because it erodes a tribe's revenues, even when the tax substantially impairs the tribal government's ability to sustain itself and its programs. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 152-56 . . . (1980).

Id. at 1116. The court concluded:

> In this case, the revenues sought to be taxed by Montana may ultimately be traced to the Tribe's mineral resources, a component of the reservation land itself. This is not a case where the tribe is simply marketing a tax exemption, as where the tribes seek to sell tax-free cigarettes to non-Indians. Any substantial incursion into the revenues obtained from the sale of the Indians' land-based wealth cuts to the heart of the Tribe's ability to sustain itself.

Id. at 1117. With the above qualifications in mind, we now proceed to analyze the extent to which the state tax at issue herein intrudes upon the Tribe's ability to govern itself.

3. The Instant Case

a. The State's Interest

As previously mentioned, *Colville* recognized that a state

> has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

447 U.S. at 157. Here, it cannot be said that the tax is directed at "off-reservation" value. The tribe sells cigarettes as part of a legitimate business enterprise, at prices comparable to those sold elsewhere off the reservation, to persons who live on the reservation or who enter in order to enjoy its recreational resources. The retail price of cigarettes vary throughout the state, depending upon the individual retailer's marketing and promotional strategies. Declaration of Robert G. Posner at 3. The factors which influence this choice include a store's volume of sales, location and the type of consumer products it sells. Declaration of Sandra Campbell.

Robert G. Posner is an Economic Development Planner and Business Developer with the National Economic Development and Law Center, which was employed by the California Indian Legal Services to:

> Investigate the wholesale and retail pricing structure for cigarette sales, with specific reference to actual practices in a nearby locality;
>
> Explore the leeway possible in setting retail prices for cigarettes;
>
> Analyze the effect of the State of California tax structure on retail prices;
>
> Analyze the effect of varying markup rates on retail prices;
>
> Summarize the effect of marketing practices on retail prices.

Declaration of Posner at 2. On the basis of his study, he concludes that the retail pricing structure for the tribal sales parallels that industry practice of flexible pricing as it applies to the allocation of the cost of sales to the retail price, that is, the allocation of direct sales expenses and overhead expenses to the retail price structure. Although conceding that he lacks complete data as to the tribal pricing practices for other convenience goods and services, he concludes that the retail price of cigarettes on the reservation carries the same tax allocation as non-reservation retail sales, and that the variance is attributable to the cost-of-sales allocation. *Id.* at 5. The resultant tribal price is approximately $.30 less per carton than the lowest price offered by

convenience stores which Mr. Posner surveyed. He concludes that the retail price difference is not sufficient to be a major factor in inducing cigarette sales. *Id.* at 6. We are similarly persuaded that the $.30 difference does not itself draw purchasers to a reservation such as this, which offers extensive recreational opportunities.

The second facet of the *Colville* test concerns the nature of the services which the state provides to the taxpayer. In this case, the non-Indian taxpayer/purchaser enters the reservation from California and other states; some live on the reservation. In the study conducted on the reservation, 63% of the respondents who took the study were residents of California. Exhibit J, p. 23. All the reservation denizens are California residents and enjoy access to extensive state services off the reservation. The state provides substantial services on the reservation: the state maintains a county road which leads to, and runs two miles within, the reservation. The children of the Indian and non-Indian residents of the reservation attend a public school in Needles, California, which is supported by federal, state, and local funds. They are transported at public expense. The Tribe operates a grammar school on the reservation; the Needles Unified School District pays its operating expenses, including teacher salaries. The Tribe provides only the building. Finally, pursuant to 18 U.S.C. § 1162, the state provides law enforcement assistance on the reservation.

b. The Tribe's Interest

The Tribe uses its tax revenues to provide essential governmental services. Sales generated by tourism are the primary sources of these revenues. The Tribe provides the following types of services: water service, law enforcement, sanitation services, road maintenance, fish and wildlife management, housing improvement program, housing provided to tribal members, community welfare and recreation, postal services. In 1978, the approximate cost of these services was $109,728. Of that amount, less than 25% was reimbursed through federal grants or other federal assistance. Thus, the Tribe, as well as the state, funds services to those who live on, and visit, the reservation.

The Tribe has attempted to demonstrate that it will suffer a loss of significant revenues if not afforded a tax credit by the state. In

1981, California Indian Legal Services contracted with the Survey Research Center of the University of California to design and conduct a survey to determine the effect of imposing the state cigarette tax, without a credit, on tribal cigarette sales. The Research Center prepared a questionnaire and conducted a survey on the reservation. The Center reported:

> More than three-quarters of the respondents were non-resident visitors to the reservation; the vast majority of those visitors (82%) lived elsewhere in California.
>
> About four out of every five of the visitor/respondents (82%) had visited the reservation before; most of these persons (66%) had visited several times in the past two years.
>
> The activities most frequently mentioned by visitor/respondents as planned during their stay were water sports (84%) and fishing (39%).
>
> Most of the visitor/respondents intended to stay at the reservation at least one night but less than one week. Some 60% of the non-resident respondents stayed in campgrounds and mobile home parks maintained by the reservation.
>
> Among both resident and visitor respondents, a substantial minority (between 30 and 45%) bought cigarettes in amounts of one carton or more.
>
> On the average, visitor/respondents reported that single packages were about $.15 cheaper and cartons about $.40 cheaper on the reservation than in their home cities.
>
> For the majority of visitor/respondents (56%), the price of cigarettes per carton on the reservation during the study period was within $.50 of the price paid in their usual place of residence. Only 8% paid more than $.50 in excess of the reservation price at home, while 36% paid at least 50% less at home. However, after a tax increase of $1.00 per carton, about 49% of the respondents would pay at least $.50 more per carton on the reservation; less than 3% would continue to face reservation prices as much as $.50 lower.

> About 55% of resident/respondents and 38% of non-resident/respondents say that they would buy fewer cigarettes if the price were increased by $.10 per pack.

Report at 6-7. The Report concluded:

> While the majority of the visitors who buy cigarettes on the reservation face prices similar to those paid at home, a sizable minority of visitors can purchase cigarettes at significantly lower prices. A tax increase of $1.00 per carton would eliminate this differential and thereby remove the incentive to stockpile for future home use. Still other visitors would experience the tax as an increase in the price over and above what they pay for cigarettes at home. These persons would be motivated to stock up at home before visiting the reservation.
>
> Respondents' reports of how they would react to a price increase are consistent with the direction of the changes in relative price: both visitors and residents say they would buy fewer cigarettes if the cost went up by an amount equal to the state tax.

Id. at 7-8.

Despite the above study, we cannot say that the Tribe has sufficiently demonstrated that it will be unable to provide essential tribal services, such as courts, if the state cigarette tax is imposed without a credit on on-reservation cigarette sales. Concerning its study, the Center candidly conceded that it was limited in scope and lacked a "rigorous framework for inference" and merely suggested the effect that might be observed if the respondents behaved in accordance with their reported intentions. Furthermore, the percentages of respondents who purportedly would buy "fewer" cigarettes are not enormous. Finally, having considered the tribal financial statements for the fiscal year 1981-82, we are unable to conclude that the anticipated reduction of profits/tax revenues from the sales of cigarettes would render the Tribe so destitute as to emasculate its ability to conduct its tribal government. The Tribe is free to reduce its tribal tax to ensure that on-reservation and off-reservation cigarette sales are reasonably competitive; it will then still retain its present level of profit on such

sales. In light of the relevant Ninth Circuit authority, we cannot conclude that the imposition of such a choice impermissibility intrudes upon tribal self-government.

c. The Federal Interest

The federal government has an interest in the effectuation of its policy of promoting tribal economic independence and self-government and in the recovery of its loans to the Tribe.

4. Conclusion

In sum, having considered the strengths of the foregoing interests, we conclude that the state enjoys the power to impose a nondiscriminatory cigarette tax without affording a credit for the tribal tax. Although the Tribe sells cigarettes at competitive prices, as part of a functioning commercial enterprise, to persons to whom it provides some governmental services, it has failed to demonstrate that its ability to conduct its tribal government will be seriously jeopardized if its cigarette sales fall to the degree anticipated by the Report. Moreover, the state does provide extensive governmental services on the reservation; therefore, its interest in obtaining tax revenues from on-reservation sales is substantial.

E. Burden Upon/Discrimination Against Indian Commerce

The Tribe asserts that the state cigarette tax unconstitutionally burdens Indian commerce by imposing a multiple tax burden. Arguing by analogy from the Supreme Court's decisions concerning interstate commerce, the tribe contends that a state tax is valid only if it 1) has a sufficient nexus to the taxing state; 2) does not discriminate against interstate/Indian commerce; 3) is fairly apportioned and 4) bears a fair relation to services provided by the taxing state. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 247, 277-78. 279 (1977). The Supreme Court, however, has never relied upon the principles embodied in its interstate commerce decisions in resolving Indian commerce clause issues.[4]

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[4] Although the Court stated cryptically in *Merrion, supra,* at 912 n.26: [W]hen the activity taxed by the Tribe occurs entirely on tribal lands, the multiple taxation issue would arise only if a *State*

The Tribe, however, does not rely upon *Complete Auto Transit* to support its further assertions that the state tax explicitly discriminates against Indian commerce in two distinct ways. First, the state prohibits the Tribe from participating in the revenue-sharing scheme which it has established for city and county governments. Second, the state does not give credit to persons who pay tribal cigarette taxes, although it affords such a credit to sister states.

1. City and County Governments

Pursuant to R. & T. Code §§ 30461 and 30462, all cigarette tax revenues required to be paid to the state under the state tax law are transmitted to the State Treasurer to be deposited in the State Treasury to the credit of the Cigarette Tax Fund. Under state law, all money deposited in the Cigarette Tax Fund is disbursed in accordance with section 30462.[5] Under the state's statutory

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attempted to levy a tax on the same activity, which is more than the *State's* contact with the activity would justify. In such a circumstance, any challenge asserting that tribal and State taxes create a multiple burden on interstate commerce should be directed at the State tax, which, in the absence of congressional ratification, might be invalidated under the Commerce Clause. These cases, of course, do not involve a challenge to state taxation, and we intimate no opinion on the possibility of such a challenge.

In the case at bar, we conclude that the state's contact with commercial activities conducted on the reservation justifies the imposition of the state cigarette tax without a tax credit.

[5] Section 30462 provides:

All money deposited in the Cigarette Tax Fund is hereby appropriated, . . . and shall, upon order of the State Controller, be drawn therefrom and allocated for the following purposes: (a) to pay the refunds authorized by this part. (b) To the Controller in an amount equal to 30 percent of the money in the fund which is derived from taxes imposed . . . , such money to be dispursed by the Controller . . . on the fifteenth day of each month thereafter to each city and county in the state in the following manner: (1) The money to be allocated pursuant to this subdivision shall be divided into two separate accounts, one for the cities and counties and counties of the state and one for the cities of the state. In order to determine

scheme, the state refunds to local city and county governments three cents on every cigarette tax dollar that is collected by cigarette retailers within their respective jurisdictions. The state does not return to the Tribe any portion of the cigarette taxes that the Tribe collects in its capacity as a retailer from non-Indian purchasers who purchase cigarettes on the reservation. However, the cities and counties are not obligated to use the funds for the general good of the state; moreover, they receive only a very small percentage of the tax revenues collected. We perceive no argument which would persuade us that the Tribe, merely because it *does* provide some services to visitors from across the state, should equitably share in the fund. Indian tribes are simply not the equivalent of state or local governments. We hold that the state's failure to include the Tribe in its revenue-sharing scheme does not discriminate against Indian commerce in violation of the Indian Commerce Clause.

2. Multi-State Tax Compact

Pursuant to R.&.T. Code § 38001 *et seq.*, the state has ratified the Multi-State Tax Compact. Under Article V of the Compact, California apportions its sales and use taxes by affording a tax credit to persons who pay such taxes to sister states.[6] The state

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> the amount of money in each account, the Controller shall first determine the amount due each county, city and county, and city in the state, in the proportion that sales tax revenues transmitted pursuant to Part 1.5 . . . of this division to each such city, city and county and in the unincorporated territory of a county bear to a total of such revenue in the state. In making such determinations, the Controller shall not consider any revenues derived from that portion of the taxes imposed by the county at a rate in excess of 1 percent pursuant to Part 1.5 . . . of this division. The balance remaining in the fund shall be transmitted to the General Fund of the State.
>
> Moneys disbursed pursuant to subdivision (b) of this section may be used for county, city and county, or city purposes, and may, but need not necessarily, be used for purposes of general interest and benefit to the state.

[6] Each purchaser liable for a use tax on tangible property shall be entitled to full credit for the combined amount or amounts of legally

does not afford a credit to persons who pay taxes to the Tribe. Hence, off-reservation sales will be subject to a single tax, while on-reservation sales are subject to a double tax. The state contends that the Multi-State Tax Compact does not deal with cigarette taxes. However, the Compact covers sales and use taxes; the tax at issue herein operates as a use tax.

The Tribe cannot prevail on this basis. The courts have distinctly stated that Indian tribes are not of equal status to state governments; tribal sovereignty is subject to plenary control by Congress.

> The United States, recognizing that tribes enjoy only a limited sovereignty, does not treat them as independent states. Therefore, for purposes of state jurisdiction over non-Indians, the federal interest in tribal political autonomy does not itself negate the fact that Indian reservations are parts of the states.

White Mountain, supra, at 1281-82. The Compact at issue involves a multiple state *agreement.* Thus, the Tribe should direct its argument to Congress, rather than to the state. The credit established by the Compact is afforded *only* to member states, of which there are approximately twenty-one. The Tribe's right to conduct itself as a state is subject to regulation by Congress. Tribal powers are divested "where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government." *Colville, supra,* at 153. Were tribes to operate as equal sovereigns with the states, our system of federalism would be disrupted.

3. The Indian Tribal Governmental Status Act

Congress, in enacting the Indian Tribal Governmental Status Act, Title II of Pub. L. No. 97-473, 96 Stat. 2605 (signed by the President Jan. 14, 1983), demonstrated its strong support for the

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imposed sales or use taxes paid by him with respect to the same property to another State and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the State, and any unused portion of the credit shall then be applied against the amount of any use tax due a sub-division.

concept of tax equivalency between state and tribal governments.The legislation amends the Internal Revenue Code to raise Indian tribal governments to the status of state and local governments for federal tax purposes. The Act authorizes, *inter alia*, a deduction from federal income taxes for taxes paid to an Indian tribe and provides that contributions to Indian tribal governments will be deductible for federal income, estate and gift tax purposes.

The Tribe contends that the evident federal policy considerations embodied in the Act should lead this court to find that the state's failure to afford the tribe a tax credit, as the state does some sister states, violates the Indian Commerce Clause. We are not persuaded that such policy condiderations may be extended to require this result. Congress has not mandated that the *states* treat all Indian tribes as if such tribes were the equivalent of state or local governments, although Congress was free to do so. Absent congressional authorization or mandate, we are not inclined to impose this burden on the states by fiat.

F. Enforcement

Under *Moe* and *Colville*, the state may validly require the Tribe to collect cigarette taxes from the purchaser and to keep records of the transactions. Moreover, the state may seize untaxed cigarettes while the cigarettes are transported in the state *before* they reach the reservation. *Colville, supra.* However, states cannot directly tax Indian reservation land or property. *McClanahan, supra; Bryan v. Itasca County*, 426 U.S. 373 (1976). *A fortiori*, a state cannot place an encumbrance upon tribal property. Moreover, Pub. L. 280, 18 U.S.C. § 1162 explicitly states:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, bank, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

Indian tribes enjoy immunity from suit, absent their consent or that of Congress. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). If a state cannot bring suit for affirmative relief, it should

not be permitted to invoke summary or extra-judicial procedures which do not provide the rudiments of due process. The state should not be able to achieve indirectly that which it cannot obtain directly.

IT IS HEREBY ORDERED that plaintiff's request for injunctive relief is hereby DENIED.

JUDGMENT FOR DEFENDANT.

Dated: September 15, 1983

/s/ ROBERT F. PECKHAM
Chief United States District
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
Nos. 83-2431 and 83-2481
DC# C-77-2838 RFP
FOR THE NINTH CIRCUIT

The Chemehuevi Indian Tribe,
Plaintiff/Appellant/Cross-Appellee,

vs.

California State Board of Equalization,
et al.,
Defendants/Appellees/Cross-Appellants.

[Filed Dec. 2, 1986]

ORDER

Before: SCHROEDER, FLETCHER and REINHARDT, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

SUBCHAPTER V—MISCELLANEOUS PROVISIONS

Sec.

GENERAL PROVISIONS

§ 1451. Congressional declaration of policy

It is hereby declared to be the policy of Congress to provide capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.

(Pub.L. 93–262, § 2, Apr. 12, 1974, 88 Stat. 77.)

Historical Note

Short Title. Section 1 of Pub.L. 93–262 provided: "That this Act [enacting this chapter] may be cited as the 'Indian Financing Act of 1974'."

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

Library References

United States ⇐53(8). C.J.S. United States § 70.

§ 1452. Definitions

For the purpose of this chapter, the term—

(a) "Secretary" means the Secretary of the Interior.

(b) "Indian" means any person who is a member of any Indian tribe, band, group, pueblo, or community which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs and any "Native" as defined in the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.].

(c) "Tribe" means any Indian tribe, band, group, pueblo, or community, including Native villages and Native groups (including corporations organized by Kenai, Juneau, Sitka, and Kodiak) as defined in the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.], which is recognized by the Federal Government as eligible for services from the the Bureau of Indian Affairs.

(d) "Reservation" includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incor-

porated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.].

(e) "Economic enterprise" means any Indian-owned (as defined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit: *Provided*, That such Indian ownership shall constitute not less than 51 per centum of the enterprise.

(f) "Organization", unless otherwise specified, shall be the governing body of any Indian tribe, as defined in subsection (c) of this section, or entity established or recognized by such governing body for the purpose of this chapter.

(g) "Other organizations" means any non-Indian individual, firm, corporation, partnership, or association.

(Pub.L. 93–262, § 3, Apr. 12, 1974, 88 Stat. 77.)

Historical Note

References in Text. The Alaska Native Claims Settlement Act, referred to in subsecs. (b) to (d), is Pub.L. 92–203, Dec. 18, 1971, 85 Stat. 688, as amended, which is classified generally to chapter 33 (section 1601 et seq.) of Title 43, Public Lands, for complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 43 and Tables volume.

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

Cross References

Amount of deposit insurance available under Federal Deposit Insurance Act for account of depositor of Indian tribe as defined in this section, see section 1821 of Title 12, Banks and Banking.

Amount of insurance available under Federal Credit Union Act for account of depositor or member of Indian tribe defined in this section, see section 1787 of Title 12.

Nonacquisition by federal agencies of excess personal property furnished to Indian tribes as defined in this section, see section 483 of Title 40, Public Buildings, Property, and Works.

State defined to include Tribe as defined in subsec. (c) of this section for purposes of joint funding simplification, see sections 7102 of Title 31, Money and Finance and 4261 of Title 42, The Public Health and Welfare.

Subcontracts and subgrants awarded preferentially to Indian organizations and economic enterprises as defined in this section, see section 450e of this title.

Library References

Indians ⇐1. C.J.S. Indians §§ 1, 2.

§ 1453. Assistance or activities of other Federal agencies unaffected

No provision of this chapter or any other Act shall be construed to terminate or otherwise curtail the assistance or activities of the Small Business Administration or any other Federal agency with respect to any Indian tribe, organization, or individual because of their eligibility for assistance under this chapter.

(Pub.L. 93–262, § 4, Apr. 12, 1974, 88 Stat. 77.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

SUBCHAPTER I—INDIAN REVOLVING LOAN FUND

§ 1461. Administration as single Indian Revolving Loan Fund sums from diverse sources; availability of fund for loans to Indians and for administrative expenses

In order to provide credit that is not available from private money markets, all funds that are now or hereafter a part of the revolving fund authorized by the Act of June 18, 1934 (48 Stat. 986), the Act of June 26, 1936 (49 Stat. 1967), and the Act of April 19, 1950 (64 Stat. 44), as amended and supplemented, including sums received in settlement of debts of livestock pursuant to sections 442 and 443 of this title, and sums collected in repayment of loans heretofore or hereafter made, and as interest or other charges on loans, shall hereafter be administered as a single Indian Revolving Loan Fund. The fund shall be available for loans to Indians having a form of organization that is satisfactory to the Secretary and for loans to individual Indians who are not members of or eligible for membership in an organization which is making loans to its members: *Provided*, That, where the Secretary determines a rejection of a loan application from a member of an organization making loans to its membership from moneys borrowed from the fund is unwarranted, he may, in his discretion, make a direct loan to such individual from the fund. The fund shall also be available for administrative expenses incurred in connection therewith.

(Pub.L. 93–262, Title I, § 101, Apr. 12, 1974, 88 Stat. 78.)

Historical Note

References in Text. Act of June 18, 1934 (48 Stat. 986), referred to in text, is classified to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title. Provisions of the Act establishing the revolving fund are set out in section 470 of this title.

Act of June 26, 1936 (49 Stat. 1967), referred to in text, is classified to subchapter VIII (section 501 et seq.) of chapter 14 of this title. Provisions of the Act relating to the revolving fund appear in section 506 of this title.

Act of Apr. 19, 1950 (64 Stat. 44), referred to in text, is classified to subchapter XXI (section 631 et seq.) of chapter 14 of this title. Provisions of the Act relating to the revolving fund appear in section 634 of this title.

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

Library References

Indians ⇐7. C.J.S. Indians § 22.

§ 1462. Economic development; educational loans; limitation of loans to or investments in non-Indian organizations

Loans may be made for any purpose which will promote the economic development of (a) the individual Indian borrower, including loans for educational purposes, and (b) the Indian organization and its members including loans by such organizations to other organizations and investments in other organizations regardless of whether they are organizations of Indians: *Provided*, That not more than 50 per centum of loan made to an organization shall be used by such organization for the purpose of making loans to or investments in non-Indian organizations.

(Pub.L. 93–262, Title I, § 102, Apr. 12, 1974, 88 Stat. 78.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

Library References

Indians ⇐7, 8.
United States ⇐82(1).
C.J.S. Indians §§ 22, 23.
C.J.S. United States § 122.

§ 1463. Repayment of loan; financing from other sources

Loans may be made only when, in the judgment of the Secretary, there is a reasonable prospect of repayment, and only to applicants who in the opinion of the Secretary are unable to obtain financing from other sources on reasonable terms and conditions.

(Pub.L. 93–262, Title I, § 103, Apr. 12, 1974, 88 Stat. 78.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

§ 1464. Maturity of loans; interest rate; interest deferral on educational loans

Loans shall be for terms that do not exceed thirty years and shall bear interest at (a) a rate determined by the Secretary of the Treasury taking into consideration the market yield on municipal bonds: *Provided*, That in no event shall the rate be greater than the rate determined by the Secretary of the Treasury taking into consideration the current average yield on outstanding marketable obligations of the United States of comparable maturity, plus (b) such additional charge, if any, toward covering other costs of the program as the Secretary may determine to be consistent with its purpose: *Provided*, That educational loans may provide for interest to be deferred while the borrower is in school or in the military service.

(Pub.L. 93–262, Title I, § 104, Apr. 12, 1974, 88 Stat. 78.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

§ 1465. Modification of amount of loan and document securing loan in collection of loan or in best interests of the United States

The Secretary may cancel, adjust, compromise, or reduce the amount of any loan or any portion thereof heretofore or hereafter made from the revolving loan fund established by this subchapter and its predecessor constituent funds which he determines to be uncollectable in whole or in part, or which is collectable only at an unreasonable cost, or when such action would, in his judgment, be in the best interests of the United States: *Provided,* That proceedings pursuant to this sentence shall be effective only after following the procedure prescribed by section 386a of this title. He may also adjust, compromise, subordinate, or modify the terms of any mortgage, lease, assignment, contract, agreement, or other document taken to secure such loans.

(Pub.L. 93–262, Title I, § 105, Apr. 12, 1974, 88 Stat. 78.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

§ 1466. Land and personal property title

Title to any land purchased by a tribe or by an individual Indian with loans made from the revolving loan fund may be taken in trust unless the land is located outside the boundaries of a reservation or a tribal consolidation area approved by the Secretary. Title to any land purchased by a tribe or an individual Indian which is outside the boundaries of the reservation or approved consolidation area may be taken in trust if the purchaser was the owner of trust or restricted interests in the land before the purchase, otherwise title shall be taken in the name of the purchasers without any restriction on alienation, control, or use. Title to any personal property purchased with a loan from the revolving loan fund shall be taken in the name of the purchaser.

(Pub.L. 93–262, Title I, § 106, Apr. 12, 1974, 88 Stat. 78.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

Code of Federal Regulations

Land acquisitions, see 25 CFR 151.1 et seq.

§ 1467. Security for loan; assignment of securities; reasonable assurance of repayment

Any organization receiving a loan from the revolving loan fund shall be required to assign to the United States as security for the loan all securities acquired in connection with the loans made to its members from such funds unless the Secretary determines that the repayment of the loan to the United States is otherwise reasonably assured.

(Pub.L. 93–262, Title I, § 107, Apr. 12, 1974, 88 Stat. 79.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

§ 1468. Authorization of appropriations

There is authorized to be appropriated, to provide capital and to restore any impairment of capital for the revolving loan fund $50,000,000 exclusive of prior authorizations and appropriations.

(Pub.L. 93–262, Title I, § 108, Apr. 12, 1974, 88 Stat. 79.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

§ 1469. Rules and regulations

The Secretary shall promulgate rules and regulations to carry out the provisions of this subchapter.

(Pub.L. 93–262, Title I, § 109, Apr. 12, 1974, 88 Stat. 79.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

Code of Federal Regulations

Loans to Indians from revolving loan fund, see 25 CFR 101.1 et seq.

Library References

Administrative Law and Procedure ⇐386.
United States ⇐40.

C.J.S. Public Administrative Bodies and Procedure § 94.
C.J.S. United States §§ 38 to 40.

SUBCHAPTER II—LOAN GUARANTY AND INSURANCE

§ 1481. Statement of purpose

In order to provide access to private money sources which otherwise would not be available, the Secretary is authorized (a) to guarantee not to exceed 90 per centum of the unpaid principal and interest due on any loan made to any organization of Indians having a form or organization satisfactory to the Secretary, and to individual Indians who are not members of or eligible for membership in an organization which is making loans to its members; and (b) in lieu of such guaranty, to insure loans under an agreement approved by the Secretary whereby the lender will be reimbursed for losses in an amount not to exceed 15 per centum of the aggregate of such loans made by it, but not to exceed 90 per centum of the loss on any one loan.

(Pub.L. 93–262, Title II, § 201, Apr. 12, 1974, 88 Stat. 79.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

Code of Federal Regulations

Loan guaranty, insurance, and interest subsidy, see 25 CFR 103.1 et seq.

Library References

Indians ⇐7. C.J.S. Indians § 22.

§ 1482. Premium charges; deposits in Indian Loan Guaranty and Insurance Fund

The Secretary shall fix such premium charges for the insurance and guarantee of loans as are in his judgment adequate to cover expenses and probable losses, and deposit receipts from such charges in the Indian Loan Guaranty and Insurance Fund established pursuant to section 1497(a) of this title.

(Pub.L. 93–262, Title II, § 202, Apr. 12, 1974, 88 Stat. 79.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

Code of Federal Regulations

Premium charges, see 25 CFR 103.43.

§ 1483. Interest rate

Loans guaranteed or insured pursuant to this subchapter shall bear interest (exclusive of premium charges for insurance, and service charge, if any) at rates not to exceed such per centum per annum on the principal obligation outstanding as the Secretary determines to be reasonable taking into consideration the range of interest rates prevailing in the private market for similar loans and the risks assumed by the United States.

(Pub.L. 93–262, Title II, § 203, Apr. 12, 1974, 88 Stat. 79.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

Code of Federal Regulations

Interest and interest subsidies, see 25 CFR 103.41, 103.42.

§ 1484. Application for loan; approval by Secretary; issuance of certificate; limitations on amount of loans to individual Indians or economic enterprises

The application for a loan to be guaranteed hereunder shall be submitted to the Secretary for prior approval. Upon approval, the Secretary shall issue a certificate as evidence of the guaranty. Such certificate shall be issued only when, in the judgment of the Secretary, there is a reasonable prospect of repayment. No loan to an individual Indian may be guaranteed or insured which would cause the total unpaid principal indebtedness to exceed $100,000. No loan to an economic enterprise (as defined in section 1452 of this title) in excess of $100,000, or such lower amount as the Secretary may determine to be appropriate, shall be insured unless prior approval of the loan is obtained from the Secretary.

(Pub.L. 93–262, Title II, § 204, Apr. 12, 1974, 88 Stat. 79.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

Code of Federal Regulations

Loan guaranty, insurance, and interest subsidy, see 25 CFR 103.1 et seq.

§ 1485. Sale or assignment of loans and underlying security to financial institutions; supervision by public agencies

Any loan guaranteed hereunder, including the security given therefor, may be sold or assigned by the lender to any financial institution subject to examination and supervision by an agency of the United States or of any State or the District of Columbia.

(Pub.L. 93–262, Title II, § 205, Apr. 12, 1974, 88 Stat. 80.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

§ 1486. Loans ineligible for guaranty or insurance

Loans made by any agency or instrumentality of the Federal Government, or by an organization of Indians from funds borrowed from the United States, and loans the interest on which is not included in gross income for the purposes of chapter 1 of Title 26 shall not be eligible for guaranty or insurance hereunder.

(Pub.L. 93–262, Title II, § 206, Apr. 12, 1974, 88 Stat. 80.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

§ 1487. Loans eligible for insurance

Any loans insured hereunder shall be restricted to those made by a financial institution subject to examination and supervision by an agency of the United States, a State, or the District of Columbia, and to loans made by Indian organizations from their own funds to other tribes or organizations of Indians.

(Pub.L. 93–262, Title II, § 207, Apr. 12, 1974, 88 Stat. 80.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

§ 1488. Lenders authorized to make loans; decrease or increase of liability under the guaranty

Loans guaranteed hereunder may be made by any lender satisfactory to the Secretary, except as provided in section 1486 of this title. The liability under the guaranty shall decrease or increase pro rata with any decrease or increase in the unpaid portion of the obligation.

(Pub.L. 93–262, Title II, § 208, Apr. 12, 1974, 88 Stat. 80.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

§ 1489. Loans made by certain financial institutions without regard to limitations and restrictions of other Federal statutes with respect to certain particulars

Any loan made by any national bank or Federal savings and loan association, or by any bank, trust company, building and loan association, or insurance company authorized to do business in the District of Columbia, at least 20 per centum of which is guaranteed hereunder, may be made without regard to the limitations and restrictions of any other Federal statute with respect to (a) ratio of amount of loan to the value of the property; (b) maturity of loans; (c) requirement of mortgage or other security; (d) priority of lien; or (e) percentage of assets which may be invested in real estate loans.

(Pub.L. 93–262, Title II, § 209, Apr. 12, 1974, 88 Stat. 80.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

Cross References

Federal savings and loan association deemed also a reference to Federal mutual savings bank, see section 1462 of Title 12, Banks and Banking.

§ 1490. Maturity of loans

The maturity of any loan guaranteed or insured hereunder shall not exceed thirty years.

(Pub.L. 93–262, Title II, § 210, Apr. 12, 1974, 88 Stat. 80.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

§ 1491. Defaults; written notification; pro rata payments; subrogation and assignment rights of Secretary; cancellation of uncollectable portion of obligations; forbearance for benefit of borrower; interest or charges cessation date

In the event of a default of a loan guaranteed hereunder, the holder of the guaranty certificate may immediately notify the Secretary in writing of such default and the Secretary shall thereupon pay to such holder the pro rata portion of the amount guaranteed and shall be subrogated to the rights of the holder of the guaranty and receive an assignment of the obligation and security. The Secretary may cancel the uncollectable portion of any obligation, to which he has an assignment or a subrogated right under this section: *Provided*, That proceedings pursuant to this sentence shall be effective only after following the procedure prescribed by section 386a of this title. Noth-

ing in this section shall be construed to preclude any forbearance for the benefit of the borrower as may be agreed upon by the parties to the loan and approved by the Secretary. The Secretary may establish the date, not later than the date of judgment and decree of foreclosure or sale, upon which accrual of interest or charges shall cease.

(Pub.L. 93–262, Title II, § 211, Apr. 12, 1974, 88 Stat. 80.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

§ 1492. Claims for losses; submission to Secretary; reimbursement: single and aggregate loss limitations, conditions; assignment of note or judgment; collection or cancellation by Secretary; interest or charges cessation date

When a lender suffers a loss on a loan insured hereunder, including accrued interest, a claim therefor shall be submitted to the Secretary. If the Secretary finds that the loss has been suffered, he shall reimburse the lender therefor: *Provided*, That the amount payable to the lender for a loss on any one loan shall not exceed 90 per centum of such loss: *Provided further*, That no reimbursement may be made for losses in excess of 15 per centum of the aggregate of insured loans made by the lender: *Provider further*, That before any reimbursement is made, all reasonable collection efforts shall have been exhausted by the lender, and the security for the loan shall have been liquidated to the extent feasible, and the proceeds applied on the debt. Upon reimbursement, in whole or in part, to the lender, the note or judgment evidencing the debt shall be assigned to the United States, and the lender shall have no further claim against the borrower or the United States. The Secretary shall then take such further collection action as may be warranted, or may cancel the uncollectable portion of any debt assigned pursuant hereto. The Secretary may establish a date upon which accrual of interest or charges shall cease.

(Pub.L. 93–262, Title II, § 212, Apr. 12, 1974, 88 Stat. 80.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

Library References

United States ⇐113. C.J.S. United States §§ 155, 156, 160 et seq.

§ 1493. Loan refusal; conditions; prohibition against acquisition of additional loans; payment of claims on loans made in good faith

Whenever the Secretary finds that any lender or holder of a guaranty certificate fails to maintain adequate accounting records, or to demonstrate

proper ability to service adequately loans guaranteed or insured, or to exercise proper credit judgment, or has willfully or negligently engaged in practices otherwise detrimental to the interests of a borrower or of the United States, he may refuse, either temporarily or permanently, to guarantee or insure any further loans made by such lender or holder, and may bar such lender or holder from acquiring additional loans guaranteed or insured hereunder: *Provided*, That the Secretary shall not refuse to pay a valid guaranty or insurance claim on loans previously made in good faith.

(Pub.L. 93–262, Title II, § 213, Apr. 12, 1974, 88 Stat. 81.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

§ 1494. Evidence of eligibility of loan for and amount of guaranty or insurance; defenses and partial defenses against original lender

Any evidence of guaranty or insurance issued by the Secretary shall be conclusive evidence of the eligibility of the loan for guaranty or insurance under the provisions of this chapter and the amount of such guaranty or insurance: *Provided*, That nothing in this section shall preclude the Secretary from establishing, as against the original lender, defenses based on fraud or material misrepresentation or bar him from establishing, by regulations in force at the date of such issuance or disbursement, whichever is the earlier, partial defenses to the amount payable on the guaranty or insurance.

(Pub.L. 93–262, Title II, § 214, Apr. 12, 1974, 88 Stat. 81.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

§ 1495. Land and personal property titles

Title to any land purchased by a tribe or by an individual Indian with loans guaranteed or insured pursuant to this subchapter may be taken in trust, unless the land is located outside the boundaries of a reservation or a tribal consolidation area approved by the Secretary. Title to any land purchased by a tribe or an individual Indian which is outside the boundaries of the reservation or approved consolidation area may be taken in trust if the purchaser was the owner of trust or restricted interests in the land before the purchase, otherwise title shall be taken in the name of the purchaser without any restriction on alienation, control, or use. Title to any personal property purchased with loans guaranteed or insured hereunder shall be taken in the name of the purchaser.

(Pub.L. 93–262, Title II, § 215, Apr. 12, 1974, 88 Stat. 81.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93-262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

Code of Federal Regulations

Land acquisitions, see 25 CFR 151.1 et seq.

Library References

Indians ⇐10, 23. C.J.S. Indians §§ 19, 28 et seq.

§ 1496. Powers of Secretary; finality of financial transactions and property acquisitions, management, and dispositions

The financial transactions of the Secretary incident to or arising out of the guarantee or insurance of loans, and the acquisition, management, and disposition of property, real, personal, or mixed, incident to such activities, shall be final and conclusive upon all officers of the Government. With respect to matters arising out of the guaranty or insurance program authorized by this subchapter and, notwithstanding the provisions of any other laws, the Secretary may—

(a) sue and be sued in his official capacity in any court of competent jurisdiction;

(b) subject to the specific limitations in this subchapter, consent to the modification, with respect to the rate of interest, time of payment on principal or interest or any portion thereof, security, or any other provisions of any note, contract, mortgage, or other instrument securing a loan which has been guaranteed or insured hereunder;

(c) subject to the specific limitations in this subchapter, pay, or compromise, any claim on, or arising because of any loan guaranty or insurance;

(d) subject to the specific limitations in this subchapter, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including, but not limited to, any equity or right of redemption;

(e) purchase at any sale, public or private, upon such terms and for such prices as he determines to be reasonable, and take title to property, real, personal, or mixed; and similarly sell, at public or private sale, exchange, assign, convey, or otherwise dispose of such property; and

(f) complete, administer, operate, obtain, and pay for insurance on, and maintain, renovate, repair, modernize, lease, or otherwise deal with any property acquired or held pursuant to the guaranty or insurance program authorized by this subchapter.

(Pub.L. 93-262, Title II, § 216, Apr. 12, 1974, 88 Stat. 81.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93-262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

Library References

United States ⇐40. C.J.S. United States §§ 38 to 40.

§ 1497. Indian Loan Guaranty and Insurance Fund

(a) Establishment of revolving fund

There is hereby created an Indian Loan Guaranty and Insurance Fund (hereinafter referred to as the "fund") which shall be available to the Secretary as a revolving fund without fiscal year limitation for carrying out the provisions of this subchapter.

(b) Aggregate loans limitation

The Secretary may use the fund for the purpose of fulfilling the obligations with respect to loans guaranteed or insured under this subchapter, but the aggregate of such loans which are insured or guaranteed by the Secretary shall be limited to $200,000,000.

(c) Assets, liabilities, and obligations of fund; loan servicing and purchasing agreements: terms and conditions

All funds, claims, notes, mortgages, contracts, and property acquired by the Secretary under this section, and all collections and proceeds therefrom, shall constitute assets of the fund; and all liabilities and obligations of such assets shall be liabilities and obligations of the fund. The Secretary is authorized to make agreements with respect to servicing loans held, guaranteed, or insured by him under this subchapter and purchasing such guaranteed or insured loans on such terms and conditions as he may prescribe.

(d) Utilization of fund for diverse payments

The Secretary may also utilize the fund to pay taxes, insurance, prior liens, expenses necessary to make fiscal adjustments in connection with the application and transmittal of collections, and other expenses and advances to protect the Secretary for loans which are guaranteed or insured under this subchapter or held by the Secretary, to acquire such security property at foreclosure sale or otherwise, and to pay administrative expenses.

(Pub.L. 93-262, Title II, § 217, Apr. 12, 1974, 88 Stat. 82.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93-262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

§ 1498. Rules and regulations

The Secretary shall promulgate rules and regulations to carry out the provisions of this subchapter.

(Pub.L. 93–262, Title II, § 218, Apr. 12, 1974, 88 Stat. 82.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

Library References

Administrative Law and Procedure ⇐386.
United States ⇐40.

C.J.S. Public Administrative Bodies and Procedure § 94.
C.J.S. United States §§ 38 to 40.

SUBCHAPTER III—INTEREST SUBSIDIES AND ADMINISTRATIVE EXPENSES

§ 1511. Interest subsidies; rules and regulations

The Secretary is authorized under such rules and regulations as he may prescribe to pay as an interest subsidy on loans which are guaranteed or insured under the provisions of subchapter II of this chapter amounts which are necessary to reduce the rate payable by the borrower to the rate determined under section 1464 of this title.

(Pub.L. 93–262, Title III, § 301, Apr. 12, 1974, 88 Stat. 82.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93–262, see 1974 U.S. Code Cong. and Adm.News, p. 2873.

Library References

Administrative Law and Procedure ⇐386.
United States ⇐40, 53(8).

C.J.S. Public Administrative Bodies and Procedure § 94.
C.J.S. United States §§ 38 to 40, 70.

§ 1512. Authorization of appropriations for Indian Loan Guaranty and Insurance Fund, interest subsidies, and administrative expenses

There are authorized to be appropriated to the Secretary (a) to carry out the provisions of sections 1497 and 1511 of this title, such sums to remain available until expended, and (b) for administrative expenses under this chapter not to exceed $20,000,000 in each of the fiscal years 1975, 1976, and 1977.

(Pub.L. 93–262, Title III, § 302, Apr. 12, 1974, 88 Stat. 82.)

(2) on January 12, 1983, are to be distributed per capita or are held in trust pursuant to a plan approved by the Congress prior to January 12, 1983, or

(3) were distributed pursuant to a plan approved by Congress after December 31, 1981 but prior to January 12, 1983, and any purchases made with such funds,

including all interest and investment income accrued thereon while such funds are so held in trust, shall be subject to Federal or State income taxes, nor shall such funds nor their availability be considered as income or resources nor otherwise utilized as the basis for denying or reducing the financial assistance or other benefits to which such household or member would otherwise be entitled under the Social Security Act [42 U.S.C.A. § 301 et seq.] or, except for per capita shares in excess of $2,000, any Federal or federally assisted program.

(As amended Pub.L. 97–458, § 4, Jan. 12, 1983, 96 Stat. 2513.)

References in Text. The Social Security, Act, referred to in text, is Act Aug. 14, 1935, c. 531, 49 Stat. 620, which is classified generally to chapter 7 (section 301 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables volume.

1983 Amendment. Pub.L. 97–458 substituted tax exemption and resources exemption limitation for prior tax exemption provision reading "None of the funds distributed per capita or held in trust under the provisions of this chapter shall be subject to Federal or State income taxes, and the per capita payments shall not be considered as income or resources when determining the extent of eligibility for assistance under the Social Security Act."

Legislative History. For legislative history and purpose of Pub.L. 97–458, see 1982 U.S. Code Cong. and Adm. News, p. 4409.

§ 1408. Resources exemption

Interests of individual Indians in trust or restricted lands shall not be considered a resource in determining eligibility for assistance under the Social Security Act [42 U.S.C.A. § 301 et seq.] or any other Federal or federally assisted program.

(Pub.L. 93–134, § 8, as added Pub.L. 97–458, § 4, Jan. 12, 1983, 96 Stat. 2514.)

References in Text. The Social Security Act, referred to in text, is Act Aug. 14, 1935, c. 531, 49 Stat. 620, which is classified generally to chapter 7 (section 301 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables volume.

Legislative History. For legislative history and purpose of Pub.L. 97–458, see 1982 U.S. Code Cong. and Adm. News, p. 4409.

CHAPTER 17—FINANCING ECONOMIC DEVELOPMENT OF INDIANS AND INDIAN ORGANIZATIONS

SUBCHAPTER II—LOAN GUARANTY AND INSURANCE

SUBCHAPTER III—INTEREST SUBSIDIES AND ADMINISTRATIVE EXPENSES

§ 1451. Congressional declaration of policy

Short Title. Pub.L. 98–449, § 1, Oct. 4, 1984, 98 Stat. 1725 provided: "That this Act [enacting section 47a of this title and amending sections 1461, 1465, 1481, 1484, 1491, 1497, 1512, 1522, 1523, 1541 and 1543 of this title] may be cited as the 'Indian Financing Act Amendments of 1984'."

SUBCHAPTER I—INDIAN REVOLVING LOAN FUND

§ 1461. Administration as single Indian Revolving Loan Fund sums from diverse sources; availability of fund for loans to Indians and for administrative expenses

In order to provide credit that is not available from private money markets, all funds that are now or hereafter a part of the revolving fund authorized by the Act of June 18, 1934 (48 Stat. 986), the Act of June 26, 1936 (49 Stat. 1967), and the Act

of April 19, 1950 (64 Stat. 44), as amended and supplemented, including sums received in settlement of debts of livestock pursuant to sections 442 and 443 of this title, and sums collected in repayment of loans heretofore or hereafter made, and as interest or other charges on loans, shall hereafter be administered as a single Indian Revolving Loan Fund. The fund shall be available for loans to Indians having a form of organization that is satisfactory to the Secretary and for loans to individual Indians: *Provided*, That, where the Secretary determines a rejection of a loan application from a member of an organization making loans to its membership from moneys borrowed from the fund is unwarranted, he may, in his discretion, make a direct loan to such individual from the fund. The fund shall also be available for administrative expenses incurred in connection therewith.

(As amended Pub.L. 98–449, § 2, Oct. 4, 1984, 98 Stat. 1725.)

1984 Amendment. Pub.L. 98–449 struck out "who are not members of or eligible for membership in an organization which is making loans to its members" before the proviso.

Legislative History. For legislative history and purpose of Pub.L. 98–449, see 1984 U.S. Code Cong. and Adm. News, p. 2889.

§ 1465. Modification of amount of loan and document securing loan in collection of loan or in best interests of the United States

The Secretary may cancel, adjust, compromise, or reduce the amount of any loan or any portion thereof heretofore or hereafter made from the revolving loan fund established by this subchapter and its predecessor constituent funds which he determines to be uncollectable in whole or in part, or which is collectable only at an unreasonable cost, or when such action would, in his judgment, be in the best interests of the United States. He may also adjust, compromise, subordinate, or modify the terms of any mortgage, lease, assignment, contract, agreement, or other document taken to secure such loans.

(As amended Pub.L. 98–449, § 3, Oct. 4, 1984, 98 Stat. 1725.)

1984 Amendment. Pub.L. 98–449 struck out the proviso at the end thereof which provided that proceedings pursuant to this section would be effective only after following the procedure set out in section 386a of this title and that the Secretary could take certain action regarding the terms of documents taken to secure loans under this section.

Legislative History. For legislative history and purpose of Pub.L. 98–449, see 1984 U.S. Code Cong. and Adm. News, p. 2889.

SUBCHAPTER II—LOAN GUARANTY AND INSURANCE

§ 1481. Statement of purpose

In order to provide access to private money sources which otherwise would not be available, the Secretary is authorized (a) to guarantee not to exceed 90 per centum of the unpaid principal and interest due on any loan made to any organization of Indians having a form or organization satisfactory to the Secretary, and to individual Indians; and (b) in lieu of such guaranty, to insure loans under an agreement approved by the Secretary whereby the lender will be reimbursed for losses in an amount not to exceed 15 per centum of the aggregate of such loans made by it, but not to exceed 90 per centum of the loss on any one loan.

(As amended Pub.L. 98–449, § 4, Oct. 4, 1984, 98 Stat. 1725.)

1984 Amendment. Pub.L. 98–449 struck out "who are not members of or eligible for membership in an organization which is making loans to its members" before "and (b) in lieu of such guaranty,".

Legislative History. For legislative history and purpose of Pub.L. 98–449, see 1984 U.S. Code Cong. and Adm. News, p. 2889.

§ 1484. Application for loan; approval by Secretary; issuance of certificate; limitations on amount of loans to individual Indians or economic enterprises

The application for a loan to be guaranteed hereunder shall be submitted to the Secretary for prior approval. The Secretary shall review each loan application

individually and independently from the lender. Upon approval, the Secretary shall issue a certificate as evidence of the guaranty. Such certificate shall be issued only when, in the judgment of the Secretary, there is a reasonable prospect of repayment. No loan to an individual Indian may be guaranteed or insured which would cause the total unpaid principal indebtedness to exceed $350,000. No loan to an economic enterprise (as defined in section 1452 of this title) in excess of $100,000, or such lower amount as the Secretary may determine to be appropriate, shall be insured unless prior approval of the loan is obtained from the Secretary.

(As amended Pub.L. 98–449, § 5, Oct. 4, 1984, 98 Stat. 1725.)

1984 Amendment. Pub.L. 98–449 substituted "$350,000" for "$100,000" in the fourth sentence.

Pub.L. 98–449 added "The Secretary shall review each loan application individually and independently from the lender."

Legislative History. For legislative history and purpose of Pub.L. 98–449, see 1984 U.S. Code Cong. and Adm. News, p. 2889.

§ 1491. Defaults; written notification; pro rata payments; subrogation and assignment rights of Secretary; cancellation of uncollectable portion of obligations; forbearance for benefit of borrower; interest or charges cessation date

In the event of a default of a loan guaranteed hereunder, the holder of the guaranty certificate may immediately notify the Secretary in writing of such default and the Secretary shall thereupon pay to such holder the pro rata portion of the amount guaranteed and shall be subrogated to the rights of the holder of the guaranty and receive an assignment of the obligation and security. The Secretary may cancel the uncollectable portion of any obligation, to which he has an assignment or a subrogated right under this section. Nothing in this section shall be construed to preclude any forbearance for the benefit of the borrower as may be agreed upon by the parties to the loan and approved by the Secretary. The Secretary may establish the date, not later than the date of judgment and decree of foreclosure or sale, upon which accrual of interest or charges shall cease.

(As amended Pub.L. 98–449, § 6, Oct. 4, 1984, 98 Stat. 1725.)

1984 Amendment. Pub.L. 98–449 struck out the proviso at the end of the second sentence, which provided that proceedings pursuant to this section shall be effective only after following the procedure set out in section 386a of this title.

Legislative History. For legislative history and purpose of Pub.L. 98–449, see 1984 U.S. Code Cong. and Adm. News, p. 2889.

§ 1497. Indian Loan Guaranty and Insurance Fund

[See main volume for text of (a) to (d)]

(e) Authorization of appropriation

There are authorized to be appropriated for each fiscal year beginning in fiscal year 1985 such sums as may be necessary to fulfill obligations with respect to losses on loans guaranteed or insured under this subchapter. All collections shall remain until expended.

(As amended Pub.L. 98–449, § 7, Oct. 4, 1984, 98 Stat. 1725.)

1984 Amendment. Subsec. (e). Pub.L. 98–449 added subsec. (e).

Legislative History. For legislative history and purpose of Pub.L. 98–449, see 1984 U.S. Code Cong. and Adm. News, p. 2889.

SUBCHAPTER III—INTEREST SUBSIDIES AND ADMINISTRATIVE EXPENSES

§ 1512. Authorization of appropriations for interest payments

There are authorized to be appropriated for fiscal year 1985, and for each fiscal year thereafter, an amount which does not exceed $5,500,000 for purposes of making interest payments authorized under this subchapter. Sums appropriated under this section, shall remain available until expended.

(As amended Pub.L. 98–449, § 8, Oct. 4, 1984, 98 Stat. 1725.)

APPENDIX E

SUBCHAPTER G—FINANCIAL ACTIVITIES

PART 101—LOANS TO INDIANS FROM THE REVOLVING LOAN FUND

Sec.

AUTHORITY: Sec. 109, 88 Stat. 77, unless otherwise noted.

SOURCE: 40 FR 3587, Jan. 23, 1975, unless otherwise noted. Redesignated at 47 FR 13327, Mar. 30, 1982.

§ 101.1 Definitions.

Wherever used in the regulations in this part, the terms defined in this section shall have meanings stated:

(a) "Secretary" means the Secretary of the Interior.

(b) "Commissioner" means the Commissioner of Indian Affairs of his authorized representative.

(c) "Indian" means any person who is a member of any Indian tribe, band, group, pueblo or community which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs and any "Native" as defined in paragraph (d) of this section.

(d) "Native" means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlakatla Indian Community), Eskimo, or Aleut blood, or combination thereof. The term includes any Native as so defined either or both of whose adoptive parents are not Natives. It also includes, in the absence of proof of a minimum blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any village or group.

(e) "Tribe" means any Indian tribe, band, group, pueblo, or community, including Native villages and Native groups (including corporations organized by Kenai, Juneau, Sitka, and Kodiak) as defined in paragraphs (f) and (g) of this section, which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs.

(f) "Native village" means any tribe, band, clan, group, village, community, or association in Alaska listed in sections 11 and 16 of the Alaska Native Claims Settlement Act (85 Stat. 688) or which meets the requirements of this Act, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives.

(g) "Native group" means any tribe, band, clan, village, community, or village association of Natives in Alaska composed of less than twenty-five Natives, who comprise a majority of the residents of the locality.

(h) "Reservation" means Indian reservations, unterminated California rancherias, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorpo-

rated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act (85 Stat. 688).

(i) "Economic enterprise" means any Indian-owned, commercial, industrial, agricultural or business activity established or organized for the purpose of profit, provided that eligible Indian ownership constitutes not less than 51 percent of the enterprise.

(j) "Organization" means the governing body of any Indian tribe, as defined in paragraph (e) of this section, or entity established or recognized by such governing body for the purpose of this Act.

(k) "Other organizations" means any non-Indian individual, firm, corporation, partnership, or association.

(l) "Profits" mean the net income earned after deducting operating expenses from operating revenues.

(m) "Revolving loan fund" means all funds that are now or hereafter a part of the revolving fund authorized by the act of June 18, 1934 (48 Stat. 986), the Act of June 26, 1936 (49 Stat. 1968), and the Act of April 19, 1950 (64 Stat. 44), as amended and supplemented including sums received in settlement of debts for livestock pursuant to the Act of May 24, 1950 (64 Stat. 190) and sums collected in repayment of loans made including interest or other charges on loans and any funds appropriated pursuant to Section 108 of the Indian Financing Act of 1974 (88 Stat. 77).

(n) "Relending Organization" means tribes as defined in paragraph (e) of this section, Indian credit associations and associations whose members have a common bond of occupation and/or residence which are organized for the purpose of borrowing from the revolving loan fund in order to conduct a relending program.

(o) "Default" means failure of a borrower to make scheduled payments on a loan, failure to obtain the lender's approval for disposal of assets mortgaged as security for a loan, or failure to comply with the covenants, obligations or other provisions of a loan agreement.

(p) "Mortgages" mean mortgages and deeds of trust evidencing an encumbrance of trust or restricted land, mortgages and security agreements executed as evidence of liens against crops and chattels, and mortgages and deeds of trust evidencing a lien on leasehold interests.

(q) "Financing statement" means the document filed or recorded in county or state offices pursuant to the provisions of the Uniform Commercial Code notifying third parties that a lender has a lien on the chattels and/or crops of a borrower.

(r) "Applicant" means an applicant for a United States direct loan from the revolving loan fund or a loan from a relending organization.

(s) "Cooperative Association" means an association of individuals organized pursuant to state, federal or tribal law, for the purpose of owning and operating an economic enterprise for profit, with profits distributed or allocated to patrons who are members of the organization.

(t) "Corporation" means an entity organized pursuant to state, federal or tribal law, with or without stock, for the purpose of owning and operating an economic enterprise.

(u) "Partnership" means two or more persons engaged in the same business, sharing its profits and risks, and organized pursuant to state, federal, or tribal law.

§ 101.2 Kinds of loans.

Loans from the Indian Revolving Loan Fund shall be made for purposes which will improve and promote the economic development on Indian reservations.

(a) Loans may be made by the United States to eligible relending organizations for relending to members for economic enterprises and to eligible tribes for relending to members, eligible corporations, cooperative associations, partnerships and subordinate bands and for financing tribal economic enterprises, which will promote the economic development of a reservation and/or the group or members thereon. Loans made by tribes or relending organizations may be for the following purposes:

(1) To individual Indians or Natives, cooperative associations, corporations and partnerships, to finance economic

enterprises operated for profit, the operation of which will contribute to the improvement of the economy of a reservation and/or the members thereon.

(2) To individual Indians or Natives for purposes of purchasing, constructing or improving housing on a reservation and to be occupied by the borrower.

(3) To individual Indians and Natives for purposes of obtaining a college or graduate education and degree in a field which will provide employment opportunities, provided that adequate funds are not available from sources such as grants, scholarships or other loan sources.

(4) To individual Indians and Natives for purposes of attending vocational schools which provide training in desired skills in a field in which there are employment opportunities, provided that adequate funds and/or training are not available from grant or scholarship sources, or federal or state training programs.

Loans may also be made by the United States to tribes for loaning to or investing in other organizations subject to the provisions in paragraph (d) of this section.

(b) Direct loans may be made by the United States to eligible tribes, individual Indians and Natives, corporations, partnerships or cooperative associations. Direct loans from the United States will be made for the following purposes:

(1) To eligible tribes, individual Indians, Natives, or associations thereof, corporations and partnerships, to finance economic enterprises operated for profit, the operation of which will contribute to the improvement of the economy of a reservation and/or the members thereon.

(2) To individual Indians and Natives for purposes of purchasing, constructing or improving housing on a reservation and to be occupied by the borrower.

(3) To individual Indians and Natives for purposes of obtaining a college or graduate education and degree in a field which will provide employment opportunities, provided that adequate funds are not available from sources such as grants, scholarships or other loan sources.

(4) To individual Indians and Natives for purposes of attending vocational schools which provide training in desired skills in a field in which there are employment opportunities, provided that adequate funds and/or training are not available from grants or scholarship sources or federal or state training programs.

(c) Before a United States direct loan is approved, the Commissioner may require the applicants to prepare a market and capacity report on existing or proposed economic enterprises for which financing is requested if the operation involves manufacturing, selling or providing services.

(d) Loans may be made to eligible tribes and Indian organizations for use in attracting industries and economic enterprises, the operation of which will contribute to the economy of a reservation. Tribes and Indian organizations may receive loans from the revolving loan fund for investment in or lending to other organizations regardless of whether they are organizations of Indians. However, not more than 50 percent of the loan made to an Indian organization may be used for the purpose of making a loan to or investing in other organizations. Applications for loans to provide funds for lending to or investing in other organizations already in operation will be accompanied by:

(1) Audited balance sheets and operating statements of the other organization for the immediate three preceding years;

(2) Pro forma operating statement and balance sheets for the succeeding three years reflecting the results of operations after injection of the additional funds;

(3) Names of owners or if a corporation and stock has been issued, names of major stockholders and shares of stock owned by each;

(4) A copy of the articles of incorporation and bylaws, if incorporated, or other organization papers if not incorporated;

(5) Names of members of the board of directors and officers with a resume of education and experience, and the number of shares of stock owned by each in the corporation;

(6) Purposes for which loan or investment will be used; and

(7) If for manufacturing, selling or providing services, a market and capacity report will be prepared. If a proposed operation is to be established, the information in paragraphs (d) (2) through (7) of this section will be furnished. The Commissioner may require additional information on the other organization, if needed, to adequately evaluate the benefits which the Indian organization will receive and the economic benefits which will accrue to a reservation. If the loan is for relending to another organization, the application must show what security is being offered. If the loan is for investment in another organization, the equity to be obtained must be shown. Copies of all agreements, contracts or other documents to be executed by the Indian organization and the other organization in connection with a loan or investment shall be submitted with the application for a loan and will require Commissioner approval prior to disbursement of loan funds to the Indian organization.

§ 101.3 Eligible borrowers under United States direct loan program.

(a) Loans may be made from the revolving loan fund to eligible tribes and relending organizations, and corporations, cooperative associations and partnerships, having a form of organization satisfactory to the Commissioner. Individual Indians and Natives who are members of tribes which are not making loans to its members and are not members of or eligible for membership in an organization which is making loans to its members, are eligible for United States direct loans. Loans may be made to applicants only when, in the judgment of the Commissioner, there is a reasonable prospect of repayment. Loans may be made only to an applicant who, in the opinion of the Commissioner, is unable to obtain financing on reasonable terms and conditions from other sources such as banks, Farmers Home Administration, Small Business Administration, Production Credit Associations, Federal Land Banks, and is also unable to obtain a guaranteed or insured loan pursuant to Title II of the Indian Financing Act of 1974 (88 Stat. 77).

(b) The establishment of a United States direct revolving loan program on a reservation(s) for making direct loans will require the approval of the Commissioner. All requests for establishing a United States direct revolving loan program on a reservation will be accompanied by reasons for need, estimate of financing needs, and other sources of financing available to meet the needs. The Commissioner, in approving a United States direct loan program, may require the preparation and approval of a plan of operation for conducting the program.

(c) If local lending conditions and/or the information in an application for a loan indicate a probability that an applicant may be able to obtain the loan from other sources, the Commissioner, before approving a United States direct loan, will require the applicant to furnish letters from two customary lenders in the area who are making loans for similar purposes, stating whether or not they are willing to make a loan to the applicant for the same purposes and amount. If a customary lender will make the loan on reasonable terms and conditions, the Commissioner will not approve a United States direct loan.

§ 101.4 Applications.

An applicant for a United States direct loan or a loan from a relending organization conducting a relending program under this part will submit an application on a form approved by the Commissioner. Applications will indicate the amount of the loan requested, purposes for which loan funds will be used, security to be offered, the period of the loan, assets and liabilities of the applicant, procedures to be followed in handling loan proceeds, repayment of the loan, budgets reflecting income and expenditures of the applicant, and any other information required to adequately evaluate the application. In addition, applications for loans to finance economic enterprises already in operation will be accompanied by: (a) A copy of operating statements, balance sheets and budgets for the prior two operating

years or applicable period thereof preceding submittal of the application; (b) current budget, balance sheet and operating statements; and (c) pro forma budgets operating statements and balance sheets showing the estimated results for operating the enterprise for two years after injection of the loan funds into the operation. A resume of the applicant's management experience will be submitted with the application. Applications for loans and requests for advance of tribal trust funds for relending under the provisions of this Part shall be accompanied by a declaration of policy and plan of operation or other acceptable plan for conducting the program. Applications for loans or modifications thereof, to establish, acquire, operate, or expand an economic enterprise shall be accompanied by a plan of operation. Declarations of policy or other plans for conducting a relending program and plans of operation for economic enterprises require the approval of the Commissioner before becoming effective. An application from a corporation, partnership or cooperative association, for a United States direct loan or a loan under a relending program for financing an economic enterprise must, in addition to financial statements and budgets, include a copy of documents establishing the entity, or the proposed documents to be used in establishing it.

§ 101.5 Approval of loans.

(a) Loan agreements, including those used by relending organizations in operating a relending program, must be executed on a form approved by the Commissioner. On direct United States loans, the Commissioner will approve the loan by issuing a commitment order covering the terms and conditions for making the loan.

(b) Applications for loans from relending organizations must be approved, if a tribe, by the governing body or designated committee, or other approving committee or body authorized to act on credit matters for a relending organization, before the Commissioner takes action on the application. This designated governing body of the tribe or committee must be authorized to act on behalf of the relending organization as evidenced in the organization's declaration of policy and plan of operation.

(c) Corporations, partnerships and cooperative associations organized for the purpose of establishing, acquiring, expanding, and operating an economic enterprise shall be organized pursuant to federal, state or tribal law. The form of organization shall be acceptable to the Commissioner. Economic enterprises which are or will be operated on a reservation(s) must comply with the requirements of applicable rules, resolutions and ordinances enacted by the governing body of the tribe.

§ 101.6 Modification of loans.

(a) *United States direct loans.* Any modification of the terms and provisions of a United States direct loan agreement must be requested in writing by the borrower and approved by the Commissioner. The borrower will submit the request for modification and will indicate the section(s) of the loan agreement to be modified together with a justification for the modification. Requests for modifications of loan agreements will include an agreement to abide by the provisions of the regulations in this Part and future amendments and modifications thereof.

(b) *Relending program.* Any modification of the terms and provisions of a loan agreement of a borrower from an organization conducting a relending program must be in writing, agreed to by the borrower, and must be approved by the body authorized to act on loans and modifications thereof as provided in an approved declaration of policy and plan of operation or other plan. If a request for modification of a loan has been disapproved by the body authorized to act on the request, the rejected borrower may request the Commissioner to make a direct loan from the revolving loan fund if the Commissioner determines that the rejection is unwarranted.

§ 101.7 Management and technical assistance.

Concurrent with the approval of a United States direct loan to finance an economic enterprise, the Commission-

er will assure under Title V of the Indian Financing Act of 1974 that competent management and technical assistance is available to the borrower consistent with the borrower's knowledge and experience and the nature and complexity of the economic enterprise being financed. Assistance may be provided by available Bureau of Indian Affairs staff, other government agencies, including states, the tribe or other sources which the Commissioner considers competent to provide needed assistance. Contracting for management and technical assistance may be used only when adequate assistance is not available without additional cost. Contracts for providing borrowers with competent management and technical assistance shall be in accordance with applicable Federal Procurement Regulations and the Buy Indian Act of April 30, 1908, chapter 153 (35 Stat. 71), as amended June 25, 1910, chapter 431, section 25 (36 Stat. 861).

§ 101.8 Environmental and Flood Disaster Acts.

Loans will not be approved until there is assurance of compliance with any applicable provisions of the Flood Disaster Protection Act of 1973 (Pub. L. 93-234, 87 Stat. 975), the National Environmental Policy Act of 1969 (Pub. L. 91-190), (42 U.S.C. 4321) and Executive Order 11514.

§ 101.9 Preservation of historical and archeological data.

(a) On United States direct loans from the revolving loan fund and modifications thereof to provide additional loan funds which will involve excavations, road or street construction, land development or disturbance of land on known or reported historical or archeological sites, the Commissioner will take or require appropriate action to assure compliance with the applicable provisions of the Act of June 27, 1960 (74 Stat. 220; (16 U.S.C. 469)), as amended by the Act of May 24, 1974 (Pub. L. 93-291, 88 Stat. 174).

(b) On loans made by relending organizations conducting a relending program using revolving loan funds, the body authorized to act on loan applications and modifications thereof will, at the time of taking action on a loan or request for modification, inform the applicant of the applicability of this Act to the loan and advise the Commissioner of compliance or the need to obtain compliance.

§ 101.10 Federal Reserve Regulation Z and Fair Credit Reporting Act.

(a) United States direct loans and loans made by a relending organization are subject to the provisions of Federal Reserve Regulation Z (Truth In Lending, 12 CFR Part 226; Pub. L. 91-508, 84 Stat. 1127). Economic enterprises which extend credit and require payment of finance charges on unpaid balances will determine the applicability of Regulation Z and comply with the requirements thereof. The Commissioner will issue any necessary instructions to assure compliance with Regulation Z on United States direct loans.

(b) Relending organizations, through their committee or other body authorized to act on loan matters on its behalf, will assure compliance with the applicable provisions of this Act.

(c) The Commissioner will require adherence to the provisions and requirements of Title VI of the Fair Credit Reporting Act in making United States direct loans. Relending organizations, through the body authorized to act on credit matters, will require compliance with the requirements of the Fair Credit Reporting Act.

§ 101.11 Interest.

(a) The interest to be charged on loans by the United States shall be at a rate determined by the Secretary of the Treasury in accordance with section 104, Title I, of the Indian Financing Act of 1974 (Pub. L. 93-262, 88 Stat. 77). The interest rate shall be determined monthly and shall be effective on advances made on loans during the current calendar month. The interest rate shall be stated in the promissory note(s) executed by the borrower(s) evidencing the advance(s).

(b) Additional charges to cover loan administration costs may be determined and charged borrowers.

(c) Educational loans may provide for waiver of interest accruals while the borrower is in school or in military service. Interest shall start on the first day of the month following one year from the date of completion of the educational course or receipt of a degree for which the loan was made. If the course is not completed, interest shall start on the first day of the month following the date the borrower drops out of school. For borrowers in the military service, interest will start on the first day of the month following discharge from service, or following completion of his or her initial enlistment term or four years, whichever is less. Military service for the purpose of this paragraph does not include activities or service in a reserve unit or National Guard which is intermittent or of a duration of less than six months.

(d) The interest rate on loans made by relending organizations which are conducting relending programs shall not be less than the rate the organization pays on its loan(s) from the United States. Relending organizations which adopt and follow the same procedure in calculating interest on educational loans as is followed on educational loans made by the United States, will not be charged interest on loans from the United States on the amount outstanding on educational loans during the period the organization is not charging its borrowers interest.

(e) Interest rates on loan advances made by the United States as shown on promissory notes dated before April 12, 1974, will remain in effect until the loan is paid in full, refinanced, or modified to extend the repayment terms. Unless otherwise specifically provided in a loan contract, the interest rate on advances made after April 12, 1974, will be at a rate determined pursuant to section 104 of Title I of the Indian Financing Act of 1974. The interest rate on loans for expert assistance will be at a rate established in § 101.25 herein.

§ 101.12 Records and reports.

Loan agreements between the United States and tribes, corporations, partnerships, cooperative associations and individual Indians for financing economic enterprises, and to relending organizations, will require that borrowers establish and maintain accounting and operating records that are satisfactory to the Commissioner and submit written reports as required by the Commissioner. The records, accounts, and loan files shall be available for examination and audit by the Commissioner at any reasonable time. Unless an exception is approved by the Commissioner, borrowers will be required to have an annual audit made of the records of relending programs and economic enterprises financed with revolving loan funds, by a certified public accountant or a firm of certified public accountants or other qualified public accountants satisfactory to the Commissioner.

§ 101.13 Security.

(a) United States direct loans shall be secured by such security as the Commissioner may require. A lack of security will not preclude the making of a loan if the proposed use of the funds is sound and the information in the application and supporting papers correctly show that expected income will be adequate to pay all expenses and the loan principal and interest payments, indicating reasonable assurance that the loan will be repaid. Loans made by relending organizations conducting a relending program using revolving loan funds will require borrowers to give security for loans, if available, but the absence of security will not preclude the making of a loan if the proposed use of the funds is sound and the information in the application and supporting papers correctly show that expected income will be adequate to pay all expenses and the loan principal and interest payments, indicating reasonable assurance that the loan will be repaid. The declaration of policy and plan of operation of relending organizations conducting relending programs will include provisions covering the type and amount of security to be taken to secure loans made.

(b) Land purchased by an individual Indian with the proceeds of a loan and land already held in trust or restricted

status by the individual Indian may be mortgaged as security for a loan in accordance with 25 CFR 152.34 and the Act of March 29, 1956 (70 Stat. 62; (25 U.S.C. 483a)). Mortgages of individually held trust or restricted land will include only an acreage of the borrower's land which the Commissioner determines is necessary to protect the loan in case of default. On proposed foreclosures which involve the sale of individually held trust or restricted land given as security for a loan, the tribe of the reservation on which the land is located will be notified in writing at least thirty calendar days in advance of the anticipated date of sale. Land purchased by a tribe with the proceeds of a loan from the revolving loan fund with title taken in a trust or restricted status, and land already held in a trust or restricted status by a tribe may not be mortgaged as security for a loan.

(1) Title to any land purchased by a tribe or by an individual Indian with revolving loan funds may be taken in trust or restricted status unless the land is located outside the boundaries of a reservation or a tribal consolidation area approved by the Secretary. Title to any land purchased by a tribe or an individual Indian which is outside the boundaries of a reservation or approved consolidation area may be taken in trust if the purchaser was the owner of trust or restricted interests in the land before the purchase. Otherwise, title shall be taken in the name of the purchaser without any restrictions on alienation, control, or use.

(c) Mortgages of leasehold interests in land held in trust or restricted status by an individual Indian, may be taken for the purpose of borrowing capital for the development and improvement of the leased premises when permitted in the lease or lease modification agreement. Such mortgages must be approved by the lessor and Commissioner. (70 Stat. 62, (25 U.S.C. 483a)).

(d) Individuals may give assignments of income from trust property as security for loans. Tribes may give assignments of trust income as security for loans provided that the assignment shall be specific as to the source(s) of income being assigned. All assignments of trust income require approval by the Commissioner before becoming effective.

(e) Chattels may be given as security for a loan. A mortgage on chattels, the title to which is known to be in trust, requires Commissioner approval. Non-trust chattels may be mortgaged without approval of any federal official.

(f) Crops grown on lands held in trust or restricted status for the benefit of an individual Indian may be given as security for a loan when approved by the Commissioner. Crops grown on leased, trust or restricted land may be given as security for a loan when permitted by the provisions of a lease or when the owner gives written consent. Approval of the lien document by the Commissioner is required. Crops grown on trust or restricted land held by a tribe which has been assigned to an individual for use may be given as security for a loan, provided the terms of the assignment permit the assignee to give the crops as secuirty for a loan or the tribe's governing body specifically gives consent. The lien document requires Commissioner approval. Crops grown on non-trust or non-restricted land may be mortgaged without the approval of any federal official.

(g) Title to any personal property purchased with a loan shall be taken in the name of the purchaser and mortgaged to secure the loan unless the loan is otherwise adequately secured. Tribes must adhere to the provisions of their constitutions and bylaws, corporate charters, or other organizational documents when mortgaging tribal property and assigning trust income as security for loans.

(h) Relending organizations receiving a loan from the United States for relending shall be required to assign to the United States as security for the loan all securities acquired in connection with loans made to its members, sub-organizations, or associations from such funds, unless the Commissioner determines that repayment of the loan to the United States is otherwise reasonably assured. Funds advanced to finance a tribal economic enterprise shall be secured by an assignment of net income and net assets of the economic enterprise, unless the Commis-

sioner determines that it is not feasible to require an assignment or that repayment of the loan to the United States is otherwise reasonably assured.

(i) Securing documents or financing statements shall be filed or recorded in accordance with applicable state or federal laws except for those customarily filed in Bureau of Indian Affairs offices. Mortgages on documented vessels will be filed at the customs house designated as the home port of the vessel as shown on the marine document.

§ 101.14 Maturity.

The maturity of any United States direct loan shall not exceed thiry years. Loans made will be scheduled for repayment at the earliest possible date consistent with the purpose of the loan and the repayment capacity of the borrower.

§ 101.15 Penalties on default.

Unless otherwise provided in the loan agreement between the United States and a borrower, failure on the part of a borrower to conform to the terms of the loan agreement will be deemed grounds for the taking of any one or all of the following steps by the Commissioner:

(a) Discontinue any further advance of funds contemplated by the loan agreement.

(b) Take possession of any or all collateral given as security and in the case of individuals, corporation, partnerships or cooperative associations, the property purchased with the borrowed funds.

(c) Prosecute legal action against the borrower or against officers of corporations, tribes, bands, credit associations, cooperative associations, and other organizations.

(d) Declare the entire amount advanced immediately due and payable.

(e) Prevent further disbursement of credit funds under the control of the borrower.

(f) Withdraw any unobligated funds from the borrower.

(g) Require relending organizations conducting a relending program to apply all collections on loans to liquidate the debt to the United States.

(h) Take possession of the assets of a relending organization conducting a relending program and exercise or arrange to exercise its powers until the Commissioner has received acceptable assurance of its repayment of the revolving loan and compliance with the provisions of the terms of the loan agreement.

(i) Liquidate, operate or arrange for the operation of economic enterprises financed with revolving loans made to individuals, tribes, corporations, partnerships and cooperative associations until the indebtedness is paid or until the Commissioner has received acceptable assurance of its repayment and compliance with the terms of the loan agreement.

§ 101.16 Default on loans made by relending organizations.

Relending organizations conducting relending programs using revolving loan funds will follow prudent lending practices in making and servicing loans and take appropriate actions to protect their interests in the security given to secure repayment of loans. Declarations of policy and plans of operation shall include procedures which will be followed in acting to correct a default, such as modification of loan agreement or foreclosure and liquidation of security. Relending organizations employing a general counsel will refer legal questions on foreclosure procedures and sale of security to their counsel.

§ 101.17 Uncollectible loans made by the United States.

If the Secretary determines that a United States direct loan is uncollectible in whole or in part or is collectible only at an unreasonable cost or when such actions would in his judgment be in the best interest of the United States, he may cancel, adjust, compromise, or reduce the amount of any loan or any portion of any loan made from the revolving loan fund. The Commissioner may adjust, comprise, subordinate or modify the terms of any mortgage, lease, assignment, contract, agreement or other document taken as security for loans. The cancellation of all or part of a loan shall

be effective only after the following steps have been taken:

(a) The Secretary submits to the Congress a report on adjustments made during the preceding fiscal year with recommendations for cancellations for the current fiscal year.

(b) Congress by concurrent resolution approves the cancellation within sixty legislative days after receipt of the report and recommendations or,

(c) Congress does not take action approving or disapproving the cancellation within sixty legislative days after receipt of the report.

(47 Stat. 564 (25 U.S.C. 386a))

§ 101.18 Uncollectible loans made by relending organizations.

(a) Relending organizations conducting relending programs using revolving loan funds may, when approved by the Commissioner, chargeoff as uncollectible all or part of the balance of principal and interest owing on loans which are considered to be uncollectible. Usually a chargeoff includes both principal and interest and provides for cessation of interest accruals on the principal balance owing as of the date of the chargeoff.

(b) Action to chargeoff a loan will be in the form of a resolution enacted by the committee or body authorized and responsible for actions on loan matters for the relending organization. Before action is taken to chargeoff a loan as uncollectible, the lender will make an effort, to the extent feasible, to liquidate the security given for a loan and apply the net proceeds as a repayment on the balance of principal and interest owed. The chargeoff of a loan by a relending organization as uncollectible will not reduce the principal balance owed to the United States. A chargeoff will not release the borrower of the obligation or the responsibility to make payments when his or her financial situation will permit. Chargeoff action will not release the lender of responsibility to continue its efforts to collect the loan.

§ 101.19 Assignment of loans.

A borrower of a direct loan from the United States may not assign the loan agreement or any interest in it to a third party without the consent of the Commissioner. Relending organizations which are conducting relending programs may not assign the loan agreements of borrowers, or any interest therein, to third parties without the approval of the Commissioner and the borrower.

§ 101.20 Tribal funds.

(a) Tribal trust funds may be advanced to tribes when authorized by Congress, requested by the governing body, and approved by the Commissioner for the establishment, operation or expansion of economic enterprises and for relending in accordance with paragraphs (b) and (c) of this section and § 101.21 herein. No interest shall be paid to the United States on such funds. The Commissioner may require the tribe to prepare a plan of operation for the enterprise and a plan establishing the policies and procedures for making loans to members from tribal funds.

(b) Support loans may be made to old, indigent or disabled members and loans may be made to cover burial expenses of members when there is reasonable assurance that the loans will be repaid. Interest may be waived on such loans. These loans, unless otherwise authorized by the Commissioner, shall be accounted for separately by the tribe and administered under a separate plan of operation from the plans governing housing, business, education and agricultural loans.

(c) In order for individuals to be eligible for loans from tribal funds, they must be members of the tribe to which the funds belong.

(d) Failure of a tribe to use tribal funds advanced under paragraph (a) of this section in accordance with the regulations and purposes for which requested shall be grounds for any or all of the following steps to be taken by the Commissioner:

(1) Discontinue further advance of funds requested.

(2) Require that the entire amount advanced be returned to the Treasury.

(3) Prevent further disbursement of tribal funds in the account of an economic enterprise or tribal relending program under the control of the tribe.

(4) Withdraw any unobligated funds from the tribe and deposit the same in the Treasury.

(5) Require that all repayments on loans made by the tribe be used to replace funds advanced to the tribe from the Treasury.

(6) In the case of tribal economic enterprises operated with tribal funds, liquidate, operate or arrange for the operation of the enterprise until all tribal trust funds advanced to the tribe have been replaced in the tribe's United States Treasury account, or until the Commissioner has received acceptable assurance that the funds will be replaced or that the enterprise will be operated in a manner satisfactory to him.

§ 101.21 Relending by borrower.

(a) A relending organization may reloan funds loaned to it by the United States with the approval of the Commissioner. The Commissioner may authorize such lenders to approve applications for particular types of loans up to a specified amount.

(b) Loans shall be secured by such securities as the lender and the Commissioner may require. With the Commissioner's approval, mortgages of individually held trust or restricted land, leasehold interests, chattels, crops grown on trust or restricted land, and assignments of trust income may all be taken as security for loans.

(c) Title to personal property purchased with loans received from relending organizations using revolving loan funds in its relending program shall be taken in the name of the borrower.

(d) The term of a loan made by a relending organization conducting a relending program shall not extend beyond the maturity date of its loan from the United States, unless an exception is approved by the Commissioner and the organization has funds available from which to make scheduled repayment on its loan from the United States. Loans made will be scheduled for repayment at the earliest possible date consistent with the purpose for which a loan is made and the indicated repayment capacity of the borrower.

(e) When a relending organization making loans to its members from moneys borrowed from the United States rejects a loan application from an eligible member, the Commissioner may, in his discretion, make a direct loan from the revolving fund to the applicant if he determines the rejection is unwarranted. In making this determination, the Commissioner will review in detail the reasons why the organization rejected the application; the soundness and feasibility of the applicant's proposal; the applicant's repayment ability, industry and work habits; whether the applicant can obtain licenses or permits required by the tribe; and assurance that the applicant has or can obtain the use of land required, if a loan is approved.

(f) Securing documents or financing statements shall be filed or recorded in accordance with federal or state law except those customarily filed in Bureau of Indian Affairs offices. Mortgages on documented vessels will be filed at the custom house designated as the home port of the vessel as shown on the marine document.

§ 101.22 Repayments on United States direct loans.

Repayments on United States direct loans shall be made to the authorized collection officer of the Bureau of Indian Affairs who shall issue an official receipt for the repayment and deposit the collection into the revolving loan fund. Collections will first be applied to pay interest to date of payment and the balance applied on the principal installment due. Collections on loans made by relending organizations which have been declared in default in which the Commissioner has taken control of the assets of the program (including loans made with balances owing) will be made to an authorized collection officer of the Bureau of Indian Affairs who shall issue a receipt to the payor and deposit the collection in the United States revolving loan fund. The relending organization's loan from the United States will be credited with the amounts collected from its borrowers, with the collections applied first on interest accrued and the balance applied

to the principal. Payments on United States direct loans may be made in advance of due dates without penalty.

§ 101.23 Repayments on loans made by relending organizations.

Repayments on loans made by a relending organization conducting a relending program will be made to the officers of the lending organization or individuals designated and authorized in a declaration of policy and plan of operation. Collections on loans and other income to a relending program will be deposited in the lender's revolving loan account as designated in a declaration of policy and plan of operation. Collections on loans will be first applied to pay interest to date of payment with the balance applied to the principal.

§ 101.24 Approval of articles of association and bylaws.

Articles of association and bylaws of relending organizations and cooperative associations require approval of the Commissioner if they make application for a revolving credit loan.

§ 101.25 Loans for expert assistance for preparation and trial of Indian claims.

(a) Loans may be made to Indian tribes, bands and other identifiable groups of Indians from funds authorized and appropriated under the provisions of section 1 of the Act of November 4, 1963 (Pub. L. 88-168, 77 Stat. 301; 25 U.S.C. 70n-1), as amended by the Act of September 19, 1966 (Pub. L. 89-592, 80 Stat. 814) and section 2 of the Act of May 24, 1973 (Pub. L. 93-37, 87 Stat. 73). Loan proceeds may only be used for the employment of expert assistance, other than the assistance of counsel, for the preparation and trial of claims pending before the Indian Claims Commission. Applications for loans will be submitted on forms approved by the Commissioner and shall include a justification of the need for a loan. The justification shall include a statement from the applicant's claims attorney regarding the need for a loan. The application will be accompanied by a statement signed by an authorized officer of the applicant certifying that the applicant does not have adequate funds available to obtain and pay for the expert assistance needed. The Superintendent and the Area Director will attest to the accuracy of the statement or point out any inaccuracies. Loans will be approved by issuance of a commitment order by the Commissioner.

(b) No loan shall be approved if the applicant has funds available on deposit in the United States Treasury or elsewhere in an amount adequate to obtain the expert assistance needed or if, in the opinion of the Commissioner, the fees to be paid the experts are unreasonable on the basis of the services to be performed by them.

(c) Contracts for the employment of experts are subject to the provisions of 25 U.S.C. 81 and require approval by the Commissioner.

(d) Vouchers or claims submitted by experts for payment for services rendered and reimbursement for expenses will be in accordance with the provisions of the expert assistance contract and shall be sufficiently detailed and itemized to permit an audit to determine that the amounts are in accordance with the contract. Vouchers or claims shall be reviewed by the borrower's claims attorney who will certify on the last page of the voucher or by attachment thereto, that the services have been rendered and payment is due the expert and that expenses and charges for work performed are in accordance with the provisions of the contract.

(e) Requests for advances under the loan agreement shall be accompanied by a certificate signed by an authorized officer of the borrower certifying that the borrower does not have adequate funds available from its own financial resources with which to pay the expert. The Superintendent and Area Director will attest to the accuracy of the statement or point out inaccuracies. A copy of the voucher or claim from the expert will accompany the request for advance.

(f) Loan funds will be advanced only as needed to pay obligations incurred under approved contracts for expert assistance. The funds will be deposited in a separate account, shall not be commingled with other funds of the borrower, and shall not be disbursed for any other purpose.

(g) Loans shall bear interest at the rate of 5½ percent per annum from the date funds are advanced until the loan is repaid.

(h) The principal amount of the loan advanced plus interest shall be repayable from the proceeds of any judgment received by the borrower at the time funds from the award become available to make the payment.

(77 Stat. 301 (25 U.S.C. 70n-1 to 70n-7))

PART 102—REVOLVING CATTLE POOL

Sec.
102.1 Definitions.
102.2 Purpose of part.
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102.4 Application.
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102.6 Approval of loans.
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102.13 Branding.
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102.15 Assignment.
102.16 Sales and exchanges.
102.17 Repayments.
102.18 Cash settlements.
102.19 Deposit of funds.
102.20 Relending by corporations and tribes.

AUTHORITY: 5 U.S.C. 301. Interpret or apply secs. 1, 2, 64 Stat. 190; 25 U.S.C. 442, 443.

SOURCE: 22 FR 10545, Dec. 24, 1957, unless otherwise noted. Redesignated at 47 FR 13327, Mar. 30, 1982.

§ 102.1 Definitions.

Wherever used in the regulations in this part, the terms defined in this section shall have the meaning stated.

(a) "Secretary" means Secretary of the Interior.

(b) "Commissioner" means Commissioner of Indian Affairs.

(c) "Corporation" means an Indian corporation chartered under section 17 of the act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477).

(d) "Tribe" means an unincorporated Indian tribe or band. A tribe shall be deemed to include any band, pueblo, or group of Indians residing on one reservation having a form of organization recognized by the Commissioner.

(e) "Loans" mean both loans of cattle repayable in kind and assignments of cattle under agreements requiring maintenance of the number and other operating conditions.

(f) "Corporate enterprise" means a business operated by a corporation.

(g) "Tribal enterprise" means a business operated by a tribe.

(h) "Area Director" means the officer in charge of the area office of the Indian Service, or his successor in office, under which the borrower is placed for administrative purposes. The authority of the Area Director under the regulations in this part may be delegated by him in writing to his subordinates in the area office.

(i) "Superintendent" means the Superintendent of the Indian Agency under which the borrower is operating.

§ 102.2 Purpose of part.

The purpose of the regulations in this part is to prescribe the terms and conditions of loans by cattle by the United States to corporations and tribes, and loans of cattle by a corporation or tribe to its members. All loans shall be for the purpose of promoting the economic development of the borrower. Sections 102.3 to 102.19, inclusive, shall govern loans of cattle by the United States. Loans of cattle by corporations and tribes originating in loans of cattle to such organizations by the United States, or purchased with cash loans or advances of tribal industrial assistance funds under the regulations in Part 101 of this chapter, shall be governed by the provisions of § 102.20.

§ 102.3 Eligible borrowers.

Loans of cattle may be made only to corporations and tribes.

§ 102.4 Application.

The application shall be submitted on a form approved by the Commissioner, and shall indicate the period of the loan, the interest, if any, to be paid, the security offered, and the procedures to be followed in handling and repaying the loan.

APPENDIX F

§480. Indians eligible for loans

On and after May 10, 1939 no individual of less than one-quarter degree of Indian blood shall be eligible for a loan from funds made available in accordance with the provisions of sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, 479, and subchapter VIII of this chapter.

(May 10, 1939, c. 119, §1, 53 Stat. 698.)

§481. Omitted

§482. Revolving fund; loans; regulations

The Secretary of the Interior, or his designated representative, is authorized, under such regulations as the Secretary may prescribe, to make loans from the revolving fund established pursuant to the Acts of June 18, 1934 (48 Stat. 984), and June 26, 1936 (49 Stat. 1967), to tribes, bands, groups, and individual Indians, not otherwise eligible for loans under said Acts: Provided, That no portion of these funds

shall be loaned to Indians of less than one-quarter Indian blood.

(May 7, 1948, c. 266, 62 Stat. 211.)

APPENDIX G

§30106. Exemption of small shipments

The taxes imposed by this part shall not apply to the use or consumption of untaxed cigarettes transported or brought into this state in a single lot or shipment of not more than 400 cigarettes by an individual for his own use or consumption, or of not more than 400 untaxed cigarettes obtained at one time from any of the instrumentalities listed in Section 30102.

APPENDIX H

Article 2

TEXT OF COMPACT

Sec.
38006. Contents.

Article 2 was added by Stats.1974, c. 93, p. 193, § 3.

§ 38006. Contents

The full text of the Multistate Tax Compact referred to in Section 38001 is as follows:

Article I. Purposes.

The purposes of this compact are to:

1. Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

2. Promote uniformity or compatibility in significant components of tax systems.

3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

4. Avoid duplicative taxation.

Article II. Definitions.

As used in this compact:

1. "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any Territory or Possession of the United States.

2. "Subdivision" means any governmental unit or special district of a State.

3. "Taxpayer" means any corporation, partnership, firm, association, governmental unit or agency or person acting as a business entity in more than one state.

4. "Income tax" means a tax imposed on or measured by net income including any tax imposed on or measured by an amount arrived at by deducting expenses from gross income, one or more forms of which expenses are not specifically and directly related to particular transactions.

5. "Capital stock tax" means a tax measured in any way by the capital of a corporation considered in its entirety.

6. "Gross receipts tax" means a tax, other than a sales tax, which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which no deduction is allowed which would constitute the tax an income tax.

7. "Sales tax" means a tax imposed with respect to the transfer for a consideration of ownership, possession or custody of tangible personal property or the rendering of services measured by the price of the tangible personal property transferred or services rendered and which is required by State or local law to be separately stated from the sales price by the seller, or which is customarily separately stated from the sales price, but does not include a tax imposed exclusively on the sale of a specifically identified commodity or article or class of commodities or articles.

8. "Use tax" means a nonrecurring tax, other than a sales tax, which (a) is imposed on or with respect to the exercise or enjoyment of any right or power over tangible personal property incident to the ownership, possession or custody of that property or the leasing of that property from another including any consumption, keeping, retention, or other use of tangible personal property and (b) is complementary to a sales tax.

9. "Tax" means an income tax, capital stock tax, gross receipts tax, sales tax, use tax, and any other tax which has a multistate impact, except that the provisions of Articles III, IV and V of this compact shall apply only to the taxes specifically designated therein and the provisions of Article IX of this compact shall apply only in respect to determinations pursuant to Article IV.

Article III. Elements of Income Tax Laws.

Taxpayer Option, State and Local Taxes.

1. Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party State or pursuant to the laws of subdivisions in two or more party States may elect to apportion and allocate his income in the manner provided by the laws of such State or by the laws of such States and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with Article IV. This election for any tax year may be made in all party States or subdivisions thereof or in any one or more of the party States or subdivisions thereof without reference to the election made in the others. For the purposes of this paragraph, taxes imposed by subdivisions shall be considered separately from State taxes and the apportionment and allocation also may be applied to the entire tax base. In no

instance wherein Article IV is employed for all subdivisions of a State may the sum of all apportionments and allocations to subdivisions within a State be greater than the apportionment and allocation that would be assignable to that State if the apportionment or allocation were being made with respect to a State income tax.

Taxpayer Option, Short Form.

2. Each party State or any subdivision thereof which imposes an income tax shall provide by law that any taxpayer required to file a return, whose only activities within the taxing jurisdiction consist of sales and do not include owning or renting real estate or tangible personal property, and whose dollar volume of gross sales made during the tax year within the State or subdivision, as the case may be, is not in excess of $100,000 may elect to report and pay any tax due on the basis of a percentage of such volume, and shall adopt rates which shall produce a tax which reasonably approximates the tax otherwise due. The Multistate Tax Commission, not more than once in five years, may adjust the $100,000 figure in order to reflect such changes as may occur in the real value of the dollar, and such adjusted figure, upon adoption by the Commission, shall replace the $100,000 figure specifically provided herein. Each party State and subdivision thereof may make the same election available to taxpayers additional to those specified in this paragraph.

Coverage.

3. Nothing in this Article relates to the reporting or payment of any tax other than an income tax.

Article IV. Division of Income.

1. As used in this Article, unless the context otherwise requires:

(a) "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

(b) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(c) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(d) "Financial organization" means any bank, trust company, savings bank, industrial bank, land bank, safe deposit company, pri-

vate banker, savings and loan association, credit union, cooperative bank, small loan company, sales finance company, investment company, or any type of insurance company.

(e) "Nonbusiness income" means all income other than business income.

(f) "Public utility" means any business entity (1) which owns or operates any plant, equipment, property, franchise, or license for the transmission of communications, transportation of goods or persons, except by pipe line, or the production, transmission, sale, delivery, or furnishing of electricity, water or steam; and (2) whose rates of charges for goods or services have been established or approved by a Federal, State or local government or governmental agency.

(g) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of this Article.

(h) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any Territory or Possession of the United States, and any foreign country or political subdivision thereof.

(i) "This State" means the State in which the relevant tax return is filed or, in the case of application of this Article to the apportionment and allocation of income for local tax purposes, the subdivision or local taxing district in which the relevant tax return is filed.

2. Any taxpayer having income from business activity which is taxable both within and without this State, other than activity as a financial organization or public utility or the rendering of purely personal services by an individual, shall allocate and apportion his net income as provided in this Article. If a taxpayer has income from business activity as a public utility but derives the greater percentage of his income from activities subject to this Article, the taxpayer may elect to allocate and apportion his entire net income as provided in this Article.

3. For purposes of allocation and apportionment of income under this Article, a taxpayer is taxable in another State if (1) in that State he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or (2) that State has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the State does or does not.

4. Rents and royalties from real or tangible personal property, capital gains, interest, dividends or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in paragraphs 5 through 8 of this Article.

5. (a) Net rents and royalties from real property located in this State are allocable to this State.

(b) Net rents and royalties from tangible personal property are allocable to this State: (1) if and to the extent that the property is utilized in this State, or (2) in their entirety if the taxpayer's commercial domicile is in this State and the taxpayer is not organized under the laws of or taxable in the State in which the property is utilized.

(c) The extent of utilization of tangible personal property in a State is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the State during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the State in which the property was located at the time the rental or royalty payer obtained possession.

6. (a) Capital gains and losses from sales of real property located in this State are allocable to this State.

(b) Capital gains and losses from sales of tangible personal property are allocable to this State if (1) the property had a situs in this State at the time of the sale, or (2) the taxpayer's commercial domicile is in this State and the taxpayer is not taxable in the State in which the property had a situs.

(c) Capital gains and losses from sales of intangible personal property are allocable to this State if the taxpayer's commercial domicile is in this State.

7. Interest and dividends are allocable to this State if the taxpayer's commercial domicile is in this State.

8. (a) Patent and copyright royalties are allocable to this State: (1) if and to the extent that the patent or copyright is utilized by the payer in this State, or (2) if and to the extent that the patent or copyright is utilized by the payer in a State in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this State.

(b) A patent is utilized in a State to the extent that it is employed in production, fabrication, manufacturing, or other processing in the State or to the extent that a patented product is produced in the State. If the basis of receipts from patent royalties does not permit allocation to States or if the accounting procedures do not reflect

States of utilization, the patent is utilized in the State in which the taxpayer's commercial domicile is located.

(c) A copyright is utilized in a State to the extent that printing or other publication originates in the State. If the basis of receipts from copyright royalties does not permit allocation to States or if the accounting procedures do not reflect States of utilization, the copyright is utilized in the State in which the taxpayer's commercial domicile is located.

9. All business income shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three.

10. The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this State during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.

11. Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

12. The average value of property shall be determined by averaging the values at the beginning and ending of the tax period but the tax administrator may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

13. The payroll factor is a fraction, the numerator of which is the total amount paid in this State during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period.

14. Compensation is paid in this State if:

(a) the individual's service is performed entirely within the State;

(b) the individual's service is performed both within and without the State, but the service performed without the State is incidental to the individual's service within the State; or

(c) some of the service is performed in the State and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the State, or (2) the

base of operations or the place from which the service is directed or controlled is not in any State in which some part of the service is performed, but the individual's residence is in this State.

15. The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this State during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

16. Sales of tangible personal property are in this State if:

(a) the property is delivered or shipped to a purchaser, other than the United States Government, within this State regardless of the f.o.b. point or other conditions of the sale; or

(b) the property is shipped from an office, store, warehouse, factory, or other place of storage in this State and (1) the purchaser is the United States Government or (2) the taxpayer is not taxable in the State of the purchaser.

17. Sales, other than sales of tangible personal property, are in this State if:

(a) the income-producing activity is performed in this State; or

(b) the income-producing activity is performed both in and outside this State and a greater proportion of the income-producing activity is performed in this State than in any other State, based on costs of performance.

18. If the allocation and apportionment provisions of this Article do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) separate accounting;

(b) the exclusion of any one or more of the factors;

(c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this State; or

(d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Article V. Elements of Sales and Use Tax Laws.

Tax Credit.

1. Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another State and any subdivision

thereof. The credit shall be applied first against the amount of any use tax due the State, and any unused portion of the credit shall then be applied against the amount of any use tax due a subdivision.

Exemption Certificates, Vendors May Rely.

2. Whenever a vendor receives and accepts in good faith from a purchaser a resale or other exemption certificate or other written evidence of exemption authorized by the appropriate State or subdivision taxing authority, the vendor shall be relieved of liability for a sales or use tax with respect to the transaction.

Article VI. The Commission.

Organization and Management.

1. (a) The Multistate Tax Commission is hereby established. It shall be composed of one "member" from each party State who shall be the head of the State agency charged with the administration of the types of taxes to which this compact applies. If there is more than one such agency the State shall provide by law for the selection of the Commission member from the heads of the relevant agencies. State law may provide that a member of the Commission be represented by an alternate but only if there is on file with the Commission written notification of the designation and identity of the alternate. The Attorney General of each party State or his designee, or other counsel if the laws of the party State specifically provide, shall be entitled to attend the meetings of the Commission, but shall not vote. Such Attorneys General, designees, or other counsel shall receive all notices of meetings required under paragraph 1(e) of this Article.

(b) Each party State shall provide by law for the selection of representatives from its subdivisions affected by this compact to consult with the Commission member from that State.

(c) Each member shall be entitled to one vote. The Commission shall not act unless a majority of the members are present, and no action shall be binding unless approved by a majority of the total number of members.

(d) The Commission shall adopt an official seal to be used as it may provide.

(e) The Commission shall hold an annual meeting and such other regular meetings as its bylaws may provide and such special meetings as its Executive Committee may determine. The Commission bylaws shall specify the dates of the annual and any other regular meetings, and shall provide for the giving of notice of annual, regular

and special meetings. Notices of special meetings shall include the reasons therefor and an agenda of the items to be considered.

(f) The Commission shall elect annually, from among its members, a Chairman, a Vice Chairman and a Treasurer. The Commission shall appoint an Executive Director who shall serve at its pleasure, and it shall fix his duties and compensation. The Executive Director shall be Secretary of the Commission. The Commission shall make provision for the bonding of such of its officers and employees as it may deem appropriate.

(g) Irrespective of the civil service, personnel or other merit system laws of any party State, the Executive Director shall appoint or discharge such personnel as may be necessary for the performance of the functions of the Commission and shall fix their duties and compensation. The Commission bylaws shall provide for personnel policies and programs.

(h) The Commission may borrow, accept or contract for the services of personnel from any State, the United States, or any other governmental entity.

(i) The Commission may accept for any of its purposes and functions any and all donations and grants of money, equipment, supplies, materials and services, conditional or otherwise, from any governmental entity, and may utilize and dispose of the same.

(j) The Commission may establish one or more offices for the transacting of its business.

(k) The Commission shall adopt bylaws for the conduct of its business. The Commission shall publish its bylaws in convenient form, and shall file a copy of the bylaws and any amendments thereto with the appropriate agency or officer in each of the party States.

(*l*) The Commission annually shall make to the Governor and legislature of each party State a report covering its activities for the preceding year. Any donation or grant accepted by the Commission or services borrowed shall be reported in the annual report of the Commission, and shall include the nature, amount and conditions, if any, of the donation, gift, grant or services borrowed and the identity of the donor or lender. The Commission may make additional reports as it may deem desirable.

Committees.

2. (a) To assist in the conduct of its business when the full Commission is not meeting, the Commission shall have an Executive Committee of seven members, including the Chairman, Vice Chairman, Treasurer and four other members elected annually by the Com-

mission. The Executive Committee, subject to the provisions of this compact and consistent with the policies of the Commission, shall function as provided in the bylaws of the Commission.

(b) The Commission may establish advisory and technical committees, membership on which may include private persons and public officials, in furthering any of its activities. Such committees may consider any matter of concern to the Commission, including problems of special interest to any party State and problems dealing with particular types of taxes.

(c) The Commission may establish such additional committees as its bylaws may provide.

Powers.

3. In addition to powers conferred elsewhere in this compact, the Commission shall have power to:

(a) Study State and local tax systems and particular types of State and local taxes.

(b) Develop and recommend proposals for an increase in uniformity or compatibility of State and local tax laws with a view toward encouraging the simplification and improvement of State and local tax law and administration.

(c) Compile and publish information as in its judgment would assist the party States in implementation of the compact and taxpayers in complying with State and local tax laws.

(d) Do all things necessary and incidental to the administration of its functions pursuant to this compact.

Finance.

4. (a) The Commission shall submit to the Governor or designated officer or officers of each party State a budget of its estimated expenditures for such period as may be required by the laws of that State for presentation to the legislature thereof.

(b) Each of the Commission's budgets of estimated expenditures shall contain specific recommendations of the amounts to be appropriated by each of the party States. The total amount of appropriations requested under any such budget shall be apportioned among the party States as follows: one-tenth in equal shares; and the remainder in proportion to the amount of revenue collected by each party State and its subdivisions from income taxes, capital stock taxes, gross receipts taxes, sales and use taxes. In determining such amounts, the Commission shall employ such available public sources of information as, in its judgment, present the most equitable and

accurate comparisons among the party States. Each of the Commission's budgets of estimated expenditures and requests for appropriations shall indicate the sources used in obtaining information employed in applying the formula contained in this paragraph.

(c) The Commission shall not pledge the credit of any party State. The Commission may meet any of its obligations in whole or in part with funds available to it under paragraph 1(i) of this Article: provided that the Commission takes specific action setting aside such funds prior to incurring any obligation to be met in whole or in part in such manner. Except where the Commission makes use of funds available to it under paragraph 1(i), the Commission shall not incur any obligation prior to the allotment of funds by the party States adequate to meet the same.

(d) The Commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Commission shall be subject to the audit and accounting procedures established under its bylaws. All receipts and disbursements of funds handled by the Commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and become part of the annual report of the Commission.

(e) The accounts of the Commission shall be open at any reasonable time for inspection by duly constituted officers of the party States and by any persons authorized by the Commission.

(f) Nothing contained in this Article shall be construed to prevent Commission compliance with laws relating to audit or inspection of accounts by or on behalf of any government contributing to the support of the Commission.

Article VII. Uniform Regulations and Forms.

1. Whenever any two or more party States, or subdivisions of party States, have uniform or similar provisions of law relating to an income tax, capital stock tax, gross receipts tax, sales or use tax, the Commission may adopt uniform regulations for any phase of the administration of such law, including assertion of jurisdiction to tax, or prescribing uniform tax forms. The Commission may also act with respect to the provisions of Article IV of this compact.

2. Prior to the adoption of any regulation, the Commission shall:

(a) As provided in its bylaws, hold at least one public hearing on due notice to all affected party States and subdivisions thereof and to all taxpayers and other persons who have made timely request of the Commission for advance notice of its regulation-making proceedings.

(b) Afford all affected party States and subdivisions and interested persons an opportunity to submit relevant written data and views, which shall be considered fully by the Commission.

3. The Commission shall submit any regulations adopted by it to the appropriate officials of all party States and subdivisions to which they might apply. Each such State and subdivision shall consider any such regulation for adoption in accordance with its own laws and procedures.

Article VIII. Interstate Audits.

1. This Article shall be in force only in those party States that specifically provide therefor by statute.

2. Any party State or subdivision thereof desiring to make or participate in an audit of any accounts, books, papers, records or other documents may request the Commission to perform the audit on its behalf. In responding to the request, the Commission shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise. The Commission may enter into agreements with party States or their subdivisions for assistance in performance of the audit. The Commission shall make charges, to be paid by the State or local government or governments for which it performs the service, for any audits performed by it in order to reimburse itself for the actual costs incurred in making the audit.

3. The Commission may require the attendance of any person within the State where it is conducting an audit or part thereof at a time and place fixed by it within such State for the purpose of giving testimony with respect to any account, book, paper, document, other record, property or stock of merchandise being examined in connection with the audit. If the person is not within the jurisdiction, he may be required to attend for such purpose at any time and place fixed by the Commission within the State of which he is a resident: provided that such State has adopted this Article.

4. The Commission may apply to any court having power to issue compulsory process for orders in aid of its powers and responsibilities pursuant to this Article and any and all such courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the Commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the State or subdivision on behalf of which the audit is being made or a court in the State in which the object of the order being sought is situated.

The provisions of this paragraph apply only to courts in a State that has adopted this Article.

5. The Commission may decline to perform any audit requested if it finds that its available personnel or other resources are insufficient for the purpose or that, in the terms requested, the audit is impractical of satisfactory performance. If the Commission, on the basis of its experience, has reason to believe that an audit of a particular taxpayer, either at a particular time or on a particular schedule, would be of interest to a number of party States or their subdivisions, it may offer to make the audit or audits, the offer to be contingent on sufficient participation therein as determined by the Commission.

6. Information obtained by any audit pursuant to this Article shall be confidential and available only for tax purposes to party States, their subdivisions or the United States. Availability of information shall be in accordance with the laws of the States or subdivisions on whose account the Commission performs the audit, and only through the appropriate agencies or officers of such States or subdivisions. Nothing in this Article shall be construed to require any taxpayer to keep records for any period not otherwise required by law.

7. Other arrangements made or authorized pursuant to law for cooperative audit by or on behalf of the party States or any of their subdivisions are not superseded or invalidated by this Article.

8. In no event shall the Commission make any charge against a taxpayer for an audit.

9. As used in this Article, "tax," in addition to the meaning ascribed to it in Article II, means any tax or license fee imposed in whole or in part for revenue purposes.

Article IX. Arbitration.

1. Whenever the Commission finds a need for settling disputes concerning apportionments and allocations by arbitration, it may adopt a regulation placing this Article in effect, notwithstanding the provisions of Article VII.

2. The Commission shall select and maintain an Arbitration Panel composed of officers and employees of State and local governments and private persons who shall be knowledgeable and experienced in matters of tax law and administration.

3. Whenever a taxpayer who has elected to employ Article IV, or whenever the laws of the party State or subdivision thereof are substantially identical with the relevant provisions of Article IV, the taxpayer, by written notice to the Commission and to each party

State or subdivision thereof that would be affected, may secure arbitration of an apportionment or allocation, if he is dissatisfied with the final administrative determination of the tax agency of the State or subdivision with respect thereto on the ground that it would subject him to double or multiple taxation by two or more party States or subdivisions thereof. Each party State and subdivision thereof hereby consents to the arbitration as provided herein, and agrees to be bound thereby.

4. The Arbitration Board shall be composed of one person selected by the taxpayer, one by the agency or agencies involved, and one member of the Commission's Arbitration Panel. If the agencies involved are unable to agree on the person to be selected by them, such person shall be selected by lot from the total membership of the Arbitration Panel. The two persons selected for the Board in the manner provided by the foregoing provisions of this paragraph shall jointly select the third member of the Board. If they are unable to agree on the selection, the third member shall be selected by lot from among the total membership of the Arbitration Panel. No member of a Board selected by lot shall be qualified to serve if he is an officer or employee or is otherwise affiliated with any party to the arbitration proceeding. Residence within the jurisdiction of a party to the arbitration proceeding shall not constitute affiliation within the meaning of this paragraph.

5. The Board may sit in any State or subdivision party to the proceeding, in the State of the taxpayer's incorporation, residence or domicile, in any State where the taxpayer does business, or in any place that it finds most appropriate for gaining access to evidence relevant to the matter before it.

6. The Board shall give due notice of the times and places of its hearings. The parties shall be entitled to be heard, to present evidence, and to examine and cross-examine witnesses. The Board shall act by majority vote.

7. The Board shall have power to administer oaths, take testimony, subpoena and require the attendance of witnesses and the production of accounts, books, papers, records, and other documents, and issue commissions to take testimony. Subpoenas may be signed by any member of the Board. In case of failure to obey a subpoena, and upon application by the Board, any judge of a court of competent jurisdiction of the State in which the Board is sitting or in which the person to whom the subpoena is directed may be found may make an order requiring compliance with the subpoena, and the court may punish failure to obey the order as a contempt. The provisions of this paragraph apply only in States that have adopted this Article.

8. Unless the parties otherwise agree the expenses and other costs of the arbitration shall be assessed and allocated among the parties by the Board in such manner as it may determine. The Commission shall fix a schedule of compensation for members of Arbitration Boards and of other allowable expenses and costs. No officer or employee of a State or local government who serves as a member of a Board shall be entitled to compensation therefor unless he is required on account of his service to forego the regular compensation attaching to his public employment, but any such Board member shall be entitled to expenses.

9. The Board shall determine the disputed apportionment or allocation and any matters necessary thereto. The determinations of the Board shall be final for purposes of making the apportionment or allocation, but for no other purpose.

10. The Board shall file with the Commission and with each tax agency represented in the proceeding: the determination of the Board; the Board's written statement of its reasons therefor; the record of the Board's proceedings; and any other documents required by the arbitration rules of the Commission to be filed.

11. The Commission shall publish the determinations of Boards together with the statements of the reasons therefor.

12. The Commission shall adopt and publish rules of procedure and practice and shall file a copy of such rules and of any amendment thereto with the appropriate agency or officer in each of the party States.

13. Nothing contained herein shall prevent at any time a written compromise of any matter or matters in dispute, if otherwise lawful, by the parties to the arbitration proceedings.

Article X. Entry Into Force and Withdrawal.

1. This compact shall enter into force when enacted into law by any seven States. Thereafter, this compact shall become effective as to any other State upon its enactment thereof. The Commission shall arrange for notification of all party States whenever there is a new enactment of the compact.

2. Any party State may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party State prior to the time of such withdrawal.

3. No proceeding commenced before an Arbitration Board prior to the withdrawal of a State and to which the withdrawing State or any subdivision thereof is a party shall be discontinued or terminated

by the withdrawal, nor shall the Board thereby lose jurisdiction over any of the parties to the proceeding necessary to make a binding determination therein.

Article XI. Effect on Other Laws and Jurisdiction.

Nothing in this compact shall be construed to:

(a) Affect the power of any State or subdivision thereof to fix rates of taxation, except that a party State shall be obligated to implement Article III 2 of this compact.

(b) Apply to any tax or fixed fee imposed for the registration of a motor vehicle or any tax on motor fuel, other than a sales tax: provided that the definition of "tax" in Article VIII 9 may apply for the purposes of that Article and the Commission's powers of study and recommendation pursuant to Article VI 3 may apply.

(c) Withdraw or limit the jurisdiction of any State or local court or administrative officer or body with respect to any person, corporation or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body.

(d) Supersede or limit the jurisdiction of any court of the United States.

Article XII. Construction and Severability.

This compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any State or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any State participating therein, the compact shall remain in full force and effect as to the remaining party States and in full force and effect as to the State affected as to all severable matters.

(Added by Stats.1974, c. 93, p. 193, § 3.)

Historical Note

Operative effect of Stats.1974, c. 93, see Historical Note under § 38001.

Cross References

Enactment of Article IV construed as reenactment of §§ 25120 to 25137, see § 25138.
Interstate audits, see § 38021.

PART 18. MULTISTATE TAX COMPACT

ARTICLE 1. ENACTMENT OF COMPACT

§ 38001. Form

1986 Legislation.

Legislative Counsel's letter of Feb. 26, 1986, advised that none of the conditions specified by § 5 of Stats.1974, c. 93 have been satisfied so Chapter 93 remains operative.

Complementary Legislation:

Ala.—Code 1975, §§ 40-27-1 to 40-27-6.
Alaska—AS 43.19.010 to 43.19.050.
Ark.—Ark.Stats. §§ 84-4101 to 84-4106.
Cal.—West's Ann.Cal.Rev. & T.Code, §§ 38001 to 38021.
Colo.—C.R.S. 1973, 24-60-1301 to 24-60-1307.
D.C.—Code 1981, §§ 47-441 to 47-446.
Hawaii—HRS §§ 255-1 to 255-3.
Idaho—I.C. §§ 63-3701 to 63-3708.
Kan.—K.S.A. 79-4301 et seq.
Mich.—M.C.L.A. §§ 205.581 to 205.589.
Minn.—M.S.A. §§ 290.171 to 290.175.
Mo.—V.A.M.S. §§ 32.200 to 32.260.
Mont.—MCA 15-1-601 to 15-1-604.
Neb.—R.R.S.1943, §§ 77-2901 to 77-2903.
Nev.—N.R.S. 376.010 to 376.060.
N.M.—NMSA 1978, §§ 7-5-1 to 7-5-7.
N.D.—NDCC 57-59-01 to 57-59-08.
Ore.—ORS 305.655 to 305.675, 314.705, 314.710.
S.D.—SDCL 10-54-1 to 10-54-4.
Tex.—V.T.C.A., Tax Code §§ 141.001 to 141.005.
Utah—U.C.A.1953, 59-22-1 to 59-22-9.
Wash.—West's RCWA 82.56.010 to 82.56.050.

ARTICLE 3. STATE REPRESENTATION

§ 38011. Membership

The * * * executive officer of the Franchise Tax Board shall be the member of the Multistate Tax Commission to represent this state for the commission's fiscal year period beginning in even-numbered calendar years and the * * * executive secretary of the State Board of Equalization shall be such member for the commission's fiscal year period beginning in odd-numbered calendar years.

(Amended by Stats.1980, c. 426, p. 903, § 34.)

PART 18.5. TIMBER YIELD TAX

CHAPTER 1. GENERAL PROVISIONS AND DEFINITIONS

Law Review Commentaries

Challenging the assessment of the California timber yield tax against purchasers of Indian timber. (1982) 13 Pacific L.J. 1325.

§ 38104. Timber owner

"Timber owner" means any person who owns timber immediately prior to felling or the first person who acquires either the legal title or beneficial title to timber after it has been felled from land owned by a federal agency or any other person or agency or entity exempt from property taxation under the Constitution or laws of the United States or under the Constitution or laws of the State of California. "Timber owner" includes any person who owns or acquires legal title or beneficial title to downed timber in this state.

"Timber owner" also includes the seller of timber located on land owned by that seller if the timber sales agreement, contract, or other document provides for the payment of the purchase price on the basis of actual timber volume scaled and does not contain a passage of title clause.

(Amended by Stats.1981, c. 947, p. 3614, § 15.)

1981 Amendment. Added the second paragraph.

§ 38107. Repealed by Stats.1983, c. 1281, p. ——, § 45, urgency, eff. Sept. 30, 1983

§ 38108. Scaling date

"Scaling date" means the date when the quantity of timber harvested, by species, is first definitely determined.